No. 1770.

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

Charles W. Clark,
Appellant,

vs.

The Rosario Mining and Milling Company, a corporation,
Appellee.

PETITION FOR REHEARING.

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Filed in San Francisco, California, on the .... day of March, 1910.

.....
Clerk U. S. Circuit Court of Appeals.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

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PETITION FOR REHEARING.

To the Honorable, the Judges of the United States Circuit Court of Appeals, Ninth Circuit:

The appellee herein most respectfully petitions that a rehearing be granted in this case.

We understand that the decree of the lower court in the case has been reversed and remanded, and complainant's bill ordered dismissed for three reasons, to-wit:

First: This court holds that the contract in suit withholds the right of specific performance of the same from appellee, and therefore, for its breach by appellant and his associates, the appellee should be limited to its legal

remedy—an action at law to recover the stipulated damages, to-wit: $100,000.

SECOND: This court also holds there was a *mistake* on the part of appellant in regard to the title to the property in question at the time of the execution of said contract, and that in his answer he alleges appellee's title to the property was defective and that appellant introduced evidence tending to show appellee's title was, in fact, defective, therefore a court of equity could not, for this reason, enforce the specific performance of said contract, although by the express terms of the contract appellant and his associates were to receive from complainant only *"the titles which the first party* (complainant), *through its directors or otherwise, has" in and to the property.*

THIRD: The court further holds that said contract is *one-sided, harsh, unconscionable* and *destitute of all equity*, and for this reason there is no equity shown in complainant's bill, and therefore a court of equity has no jurisdiction of the case, and it orders this suit to be peremptorily dismissed, leaving the complainant to its remedy at law, if any.

For the above three reasons given it is held that the lower court as well as this court, sitting as courts of equity, had no jurisdiction of the case, and, therefore, the judgment of the lower court was reversed and remanded by this court with directions to the court below to dismiss complainant's suit.

We are led to urge and petition for a rehearing in behalf of appellee, for the reason that we submit this court erred in its decree in this case, and erred in each

and all of its conclusions above given, and in the construction placed upon said contract. We shall discuss each of said errors in the order given, and shall ask this court to set aside the decree rendered in the case and to grant a rehearing.

Appellant urges in his brief that inasmuch as appellee has filed no cross-assignments of error, that therefore appellee acquiesces in the decree of the lower court and cannot be heard to object to any of the *findings of fact or conclusions of law* made by the lower court in arriving at and rendering said decree.

The Supreme Court of the United States in the case of the Schooner Stephen Morgan v. Good, 94 U. S. 599 (L. Ed. 266), states:

"Parties who do not appeal from a final decree of a circuit court which is regular in form, cannot be heard in opposition to the decree when the cause is removed here by the opposite party * * * *unless in support of the decree and in opposition to every assignment of error filed by the appellants.*"

Harrison v. Nixon, 9 Pet. 494;
Canter v. Ins. Co., 3 Pet. 318.

So while appellee does not object to the decree of the lower court, and would be satisfied if the same was affirmed by this court, yet we are not precluded by all or any of the findings of fact or conclusions of law made by the lower court in rendering said decree. We certainly have the right to show the errors of this court, if any, in reversing and remanding the case, and in directing that plaintiff's suit be summarily dismissed, thereby depriving complainant of any right or remedy whatever,

inasmuch as an action for damages for the breach of the contract is barred by the statute of limitation.

I.

This court in its opinion in this case states:

"THE FIRST AND INSUPERABLE OBSTACLE TO THE AFFIRMANCE OF THE DECREE APPEALED FROM, IS THAT THE AGGRIEVED PARTY BROUGHT ITS SUIT IN A COURT OF EQUITY TO ENFORCE THE SPECIFIC PERFORMANCE OF A WRITTEN CONTRACT, WHICH CONTRACT SHOWED UPON ITS FACE, AS THE COURT BELOW EXPRESSLY HELD, THAT FOR ITS BREACH BY THE APPELLANT AND HIS ASSOCIATES, THE APPELLEE SHOULD NOT BE ENTITLED TO A SPECIFIC PERFORMANCE OF IT, BUT SHOULD BE LIMITED TO A STIPULATED SUM AS DAMAGES OF $100,000. UNDER SUCH CIRCUMSTANCES, THE ONLY APPROPRIATE TRIBUNAL FOR THE RECOVERY OF THAT MONEY DEMAND WAS A COURT OF LAW."

In other words, the court holds that the contract on its face shows appellee had no equitable remedy whatever, but only a remedy at law for the breach of the contract.

Judge Dietrich, in his opinion rendered in this case, states:

"In so far as a principle of law was announced or clearly involved in the decision (of Judge Morrow overruling said demurrer to the complaint), I WOULD UNHESITATINGLY RECOGNIZE IT AS CONTROLLING; BUT IN SOME MEASURE, AT LEAST, THE QUESTION WHETHER OR NOT THE COMPLAINANT WAIVED THE REMEDY OF SPECIFIC PERFORMANCE IS ILLUMINATED BY THE EVIDENCE, AND, IF SO, THE DUTY TO AGAIN ENTERTAIN IT IS PLAIN." [Tr. p. 160.]

Again Judge Dietrich in his opinion states:

"The apparent meaning of the instrument (contract) is that in case of the refusal to purchase, the only remedy against the defendant is one for damages. This is THE PROBABLE CONSTRUCTION that Clark, Whitmore and Sizer gave to it (the contract)." [Tr. p. 162.]

Judge Dietrich further held that the meaning of said paragraph 8 of the contract, as to whether or not it gave the complainant an equitable cause of action, was *doubtful* and *not clear;* that where there is such doubt there is substantial ambiguity, and that such doubt should be "resolved against the complainant." This is the construction placed upon the contract, however erroneous the same may be.

It became necessary for the lower court to assume jurisdiction of this case in order to pass upon this most important question in the contract, and the other equitable issues. We submit the lower court did have jurisdiction of the case, and after finally determining, for the reasons given, not to enforce the contract, the court, in accordance with the doctrine laid down in Cathcart v. Robinson, 5 Pet., and other authorities, did retain jurisdiction *in order to do full and complete justice between the parties with respect to the subject-matter, by awarding to the complainant liquidated damages, provided by the terms of the contract, without requiring the complainant to be put to the trouble, expense and delay of a second suit brought in another tribunal.*

A
Expressio Unius est Exclusio Alterius.

This court and the lower court erroneously held that the rule *expressio unius est exclusio alterius* applies directly to provision 8 of the contract.

Judge Dietrich in the decree of the lower court states:

"By paragraph 8 of the contract, it was provided that in case of the failure of defendants to pay $400,000 upon notice of the acceptance by the complainant of their continuing offer they should be 'liable to the first party in damages in the stipulated sum of $100,000.' This is the only remedy for relief expressly provided for. True, if this were all, there is very eminent authority for the view that it does not follow that the parties intended that complainant waive its right to require specific performance, and that therefore it cannot be denied such remedy by reason of this clause. But in this contract the parties went further in disclosing their intention. In the same paragraph it is provided that if 'the first party shall fail or refuse to comply with this contract to sell their said property at that price, then the first party shall be liable to the second party in liquidated damages to the amount of $100,000. This shall not deprive the second parties of the right to waive damages and have specific performance of this contract.' "

And, by reason of said provision in paragraph 8, the lower court reaches the final conclusion as follows:

"Upon this breach of the case, the conclusion reached is that, in the light of the record, the contract, fairly construed, discloses an intention to withhold from complain-

ant the right to require the defendants specifically to perform."

Was the lower court correct in reaching this conclusion of law in the construction of the contract, and was this Honorable Court correct in affirming said conclusion of the lower court? We most respectfully submit that both the lower court and this Honorable Court have erred in placing this construction upon the contract.

B

The Contract.

The contract of May 1st, 1902, is a dual contract; that is, it contained *two distinct agreements* which have little connection with each other. Let us examine carefully the duality of this contract and see if we are not correct in this assertion. We will separate the contract in the two distinct agreements and designate them as exhibits "A" and "B," as follows:

FIRST AGREEMENT, EXHIBIT "A."

"Whereas, the said second parties have after examination of said property, and the titles thereto, notified the first party that the second party is satisfied with the titles to said property in the first party * * * and have offered to the first party to buy said property at the price of ($400,000) four hundred thousand dollars cash (American gold); and whereas the first party has refused to accept said offer * * * and whereas, the second parties as a consideration in part for *this option contract* (exhibit B) are desirous of keeping open said offer to buy said property at the price of $400,000, subject to the right of the first party to accept the offer at any time during the life of this contract;

"Now, therefore, it is hereby mutually agreed between the parties hereto, as follows:

"1. The second parties offer to the first party to buy from the first party said property, and to pay to the first party therefor the sum of ($400,000) four hundred thousand dollars, American gold, at Fort Worth, Texas, and to make said payment within thirty days after being notified of an acceptance by the first party of said offer; provided, however, that if the said offer is accepted within the next four months, the second party shall have until September 1st, 1902, to make such payment. The first party concurrently or as near as may be with such payment, to cause to be transferred to the second parties the titles which the first party through its directors or otherwise has in and to said property. And the second parties agree to leave said offer open for one year from this date, subject to the acceptance of the first party at any time during the said year. Said titles having been examined by the second parties, it is agreed that the same are good and sufficient. * * *

"8. In the event of an acceptance by the first party of the offer of the second parties to buy said property at the price of $400,000, and a failure or refusal of the second parties to make good the offer to buy said property, then the second parties shall be liable to the first party in damages in the stipulated sum of $100,000. The object of this clause of this contract is to make the measure of damages certain, whereas without such stipulation by reason of the peculiar character of the property and situation and surroundings of the parties, it would be impossible to arrive at any just and correct measure

of damages by proof in a court of law." [Tr. 23-34.]

Also, Judge Dietrich in his opinion in this case correctly states:

"By a supplemental agreement, paragraph 1 was so modified that defendants were to have ninety instead of thirty days in which to make payment, after notice of the acceptance by complainant of the $400,000 offer.

"On April 28th, 1903, written notice of the acceptance of the offer by complainant was duly served upon defendants; but they have failed to make payment of either the stipulated price or the stipulated damages."

It will be noticed that the above and foregoing quotation is every word in the contract either directly or indirectly relating to the agreement exhibit "A," which is the contract sued upon; that is, *the offer of $400,000 by Clark and his associates for the mine and the acceptance thereof by the complainant.*

SECOND AGREEMENT, EXHIBIT "B."

The option given by complainant to Clark and his associates to purchase the mine at $600,000 is as follows:

"Whereas, on the 12th day of August, 1901, said contract (of December 12th, 1900) was extended so as to continue said option until May 1st, 1902, and the second parties again bound themselves to continue the possession and development of said mine and a proper treatment of the ores thereof, until May 1st, 1902; and

"Whereas, in each of said contracts said second parties bound themselves to examine the titles to said mining property and other property above described; and whereas said second parties by said contracts bound themselves to make reports and maps of said property

to be furnished to the first party, and showing the extent of the working upon and value of the said property and its ores, treatment and tests thereof; and

"Whereas, the said second parties have after examination of said property, and the titles thereto, notified the first party that the second party is satisfied with the titles to said property in the first party; and whereas the second party has notified said first party that they will not exercise their said options to buy said property at the price of $800,000, but have offered to the first party to buy the said property at the price of ($400,000) four hundred thousand dollars cash (American gold); and whereas the first party has refused to accept said offer; and *whereas, it is the desire of each of the parties to further develop said property by the development work hereinafter stipulated to the end of more certainly determining the value of said property*, so that the first party may be able to sell the same to the best advantage to any purchaser which it may find; and in the event of a sale at a figure above $600,000 to other parties that the first party will out of such proceeds compensate the second parties in part for the expenditures they have made in development of said property, as herein provided; and

"Whereas, in order to carry out this arrangement and purpose, and to afford the second parties an opportunity to buy said property at the price of $600,000, in the event of a failure of the first parties to make a sale of said property during the life of this contract, at more than $600,000, and to afford the second parties a preference right to buy said property at the price of $600,000, as herein stipulated; and

"Whereas, it is necessary to keep said property open and the operating plant in operation; and

"Whereas, the second parties as a consideration in part for *this option contract* is desirous of keeping open *said offer to buy said property at the price of $400,000,* subject to the right of the first party to accept the offer at any time during the life of this contract;

"Now therefore, it is hereby mutually agreed between the parties hereto as follows:

"2. The first party, reserving the right to sell said property and contract with reference thereto to other parties, *gives and grants to the second parties an option* to buy said property at the end of the said year, to-wit: on May 1st, 1903 (said option to be then exercised or forfeited), at the price of $600,000 cash or its equivalent, American gold, provided the first party shall not have sooner sold said property, or made a *bona fide* contract to do so; and provided further that before making any offer to sell said property at $600,000 or less to other parties, the first party shall give to the second parties *a preference right* to buy the same at said price so offered to others, and to that end shall notify the second parties of such contemplated sale or offer, and the second party shall promptly exercise its performance right upon being so notified and afforded an opportunity to do so, and shall have 30 days after electing to take the property, whereupon concurrently or as near as may be the first party shall cause said property to be conveyed to the second parties. If the second parties upon being so afforded an opportunity to exercise such performance right to purchase shall fail to do so, then such right shall cease.

"3. The first party reserving full rights to make any sale it may choose of said property, during the year agrees that if during the year up to May 1st, 1903, the first party shall sell said property or make a valid contract of sale thereof to other parties, resulting in a sale of the same, at a price greater than $600,000 *it shall pay to the second parties $50,000* out of the excess of the purchase price above $600,000, except that if such excess does not amount to $50,000, then such amount as the purchase price upon such sale shall exceed $600,000. *Provided that if the purchase price upon such sale shall not exceed $650,000, the second parties shall have the preference right to take the property at the price of $600,000.*"

The substance of paragraphs 4, 5, 6 and 7 of the contract, quoting from the opinion of this Honorable Court, is as follows:

"The contract in suit then provided for the right of free access to the mine by the first party thereto, and its appurtenances, including all books and records of its operation, and required the parties of the second part thereto to remain in possession of the property, and at their own expense to operate it until May 1, 1903, unless sooner sold, and, during the first 90 days from the date of the contract in suit, to perform certain specified work in and about the mine, and during that period of 90 days to pay to the first party 20 per cent. of the gross bullion output from the mine, mill and cyanide or other reduction plant, and to operate the mill to its full capacity, and then provided that:

" 'After the end of the 90 days or the completion of

said work, if sooner completed, the second parties shall at the option of the first party, continue the operations of the mill and cyanide plant and to keep the mine unwatered and for the purpose of paying expenses shall have the bullion output of the said mill and cyanide plant, and if the output shall exceed such expenses then the excess shall be paid to the first party as royalty, but no other royalty shall be paid out of such output, but the ore so worked during that time shall not be sorted or picked, nor the rich streaks taken out. Provided that after said work so specified shall have been completed and in any event after 90 days the first party shall have the right at any time to take possession of said property, and all of the improvements, betterments, machinery and appliances, tools, apparatus, buildings and supplies of every kind useful in the operation of the property; and as to all such supplies as under either of said preceding contracts the first party is to pay for, upon said property being turned over to it, an inventory shall be made and the same to be paid for at their reasonable value, it being understood that in determining what supplies and materials are to be turned over to the first party without being paid for, and what of such supplies are to be paid for, said original contracts are to be looked to and govern.' "

The contract in suit next made certain provisions concerning the expenses of the work, and for certain settlements and proceedings, and then continues as follows:

"8. * * * And in the event the first party shall not sell said property to other parties or contract to do so according to the terms of this contract and the second

parties shall under the provisions of this contract become entitled to exercise their option to buy the said property at $600,000, and shall elect to exercise said option and shall thereupon offer to purchase said property at said price and the first party shall fail or refuse to comply with this contract to sell their said property at that price, then the first party shall be liable to the second parties in liquidated damages to the amount of $100,000. This shall not deprive the second parties of the right to waive damages and have specific performance of this contract.

"9. Upon the termination of this contract or at any time at which the first party shall elect to take possession of said property, the same shall be turned over to the first party together with (1) all of the betterments, machinery, repairs, apparatus, supplies for all appliances and machinery and all parts thereof, tools, assay appliances and all other appliances upon the property, free of any cost to the first party, and (2) also shall be turned over to the first party all of the supplies on hand in the way of wood, charcoal, lime, merchandise, groceries, feed, powder, caps and fuse, cyanide, chemicals, and all other supplies, the first party to pay for such supplies as are mentioned under this paragraph (2) their reasonable value.

"In determining what of said materials shall be paid for and what of the same shall be turned over without compensation, the original contracts shall govern.

"10. It is further agreed by and between the parties hereto that this contract takes the place of and is a substitute for each of said original contracts, except in so far as they are referred to for the purpose of furnishing

a basis of settlement and on matter of supplies, materials, maps and reports, etc., but in the event the second parties fail to perform the obligations of this contract, then the obligations of the second parties and liability thereunder for all damages under the said original extension contracts shall exist in the same manner and to the same extent as if this contract had not been made; the full performance of this contract being a condition precedent to the second parties being relieved of any liability under said contracts." [Tr. pp. 22-36.]

C.

Did this agreement or contract sued on (exhibit "A") withhold from complainant the right of specific performance?

By the terms of the first agreement in said contract Clark and his associates made an unconditional offer of $400,000 for the property, and this offer is made to stand good during the life of the contract, which was twelve months. The only condition attached to this offer is that complainant company should notify Clark and his associates in writing of the acceptance of such offer at any time during the twelve months.

1. Clark and his associates did obligate themselves to pay the $400,000 for the mine, but the same was not binding on complainant until the offer was accepted. WHEN THE SAID OFFER WAS ACCEPTED AS SPECIFIED *in the contract of April 28th, 1903, then the option contract* (exhibit "B") *given in the same dual contract to Clark and his associates, expired and became null and void, by the terms of the contract.* As soon as this offer was accepted by the complainant and notice given, there

remained *no option of any kind, character, or description whatever* existing in favor of Clark and his associates on the property in question, for it had been terminated and had come to an end as aforesaid.

So we respectfully submit *that the conditions and terms of said option contract have no bearing on or relevancy to the offer made by Clark and his associates contained in the contract* to purchase the property at $400,000. The two agreements in the dual contract are as distinct as two separate contracts made at different times. The option did not depend upon the unconditional offer to purchase the property contained in the contract at the above price. Suppose Clark and his associates in two or three months after its execution had left the mine altogether and renounced his option. Would not the offer of $400,000 by appellant and his associates still be binding on them? And suppose that appellee afterwards gave the written notice of acceptance of said offer to them at any time during the year, would this court hold in such event that said agreement (exhibit "A") would not then be mutually binding?

The *option* was not essential to said *offer* to purchase the property. Clark and his associates could have made the same offer at any other time and in a separate instrument and the same likewise would have been binding on Clark and his associates, if accepted by appellee in the time limit and in the manner as required by the terms of the offer.

2. *The option* (exhibit "B") *given on the mine and the working and development of the mine, as required by its terms, has nothing whatever to do with the agree-*

ment (exhibit "A") *to purchase the mine as it now stands.*

The mine did not have to be further examined or developed by Mr. Clark and his associates as *a consideration for, or condition precedent to,* the enforcement of said offer of $400,000. Because the contract states that the appellant and his associates had been in possession of the mine, developing and examining the same for 18 months, and knew the value thereof at that time, and was willing and ready to pay, and did offer then to pay, $400,000 for the mine, but such offer was then rejected by complainant, but the offer was again renewed by the terms of the written contract and left open and standing for one year.

By the terms of the first agreement (exhibit "A") there was nothing necessary to be done *or contracted to be done, except the acceptance of this offer on the part of complainant.* This agreement was accepted on the 28th day of April, 1903, and thereby became vitalized and mutually binding on the vendor as well as the vendees.

The Right of Specific Performance Not Withheld.

3. The latter part of section 8 of the dual contract, relating to the remedy in the event of a breach thereof, is no part of, and in fact has no connection with, *the offer* to purchase said property made by Clark and his associates at $400,000, but the same relates only and exclusively to *the option* (exhibit "B") given to Charles W. Clark and his associates by complainant, to purchase the property at $600,000. The same is as follows:

"And shall the second party (Clark and his associates) elect to exercise *said option* to buy said property at $600,000, and shall thereupon offer to purchase said property at said price, and the said first party (complainant) shall fail or refuse to comply with *this contract* to sell said property at said price ($600,000), then the first party shall be liable to the second parties in liquidated damages to the amount of $100,000."

There is no provision, in case of a breach of the contract (exhibit "A") to sell at $400,000 by the complainant, *for the payment of liquidated damages by the complainant to Clark and his associates.*

The stipulation for the payment of liquidated damages in the sum of $100,000 by complainant is *only included in, and is a part of, the option contract* (exhibit "B").

The option became extinct and void as soon as the offer of $400,000 on the part of Clark and his associates was accepted by the complainant. The option to purchase the mine at $600,000 never was exercised by Clark and his associates, and hence never became a mutual contract. The same never became binding on Mr. Clark and his associates. We ask then how, in the name of common sense and reason, can appellee invoke said part of section 8 above quoted to prevent the enforcement of the contract (exhibit "A") sued on?

The option (exhibit "B") was simply a unilateral contract, wanting in *mutuality altogether,* and if Clark had seen fit to elect to take the property at $600,000 in the time specified, and served notice of his election on appellee, said contract would have become mutually binding, and he could have then enforced the same against

complainant company in a suit for specific performance. Or, at his option, he could have sued for and enforced section 8 of the option, which provides for the payment of the stipulated damages in the sum of $100,000, if the complainant should have breached the same.

This option contract provides by the last sentence in section 8 that the above and foregoing provision for stipulated damages in favor of Clark "shall not deprive the second parties (Clark and his associates) of the right to *waive damages* and have specific performance of this contract" (the option contract). There was no necessity for this provision in the option, as equity gave appellant this remedy without said provision. The conditions and terms of the option were quite different from the conditions and terms of the $400,000 agreement (exhibit "A").

MUTUALITY OF CONTRACTS.

4. We submit that it is a well established principle of equity that in a contract, which is mutually binding on both parties, that if either party has the right of specific performance, then necessarily the other party must have such right. We refer the court to the leading case of Raymond v. San Gabriel Valley L. etc. Co., 53 Fed. Rep. 883. In this case there was a written contract entered into between the vendor and vendee to convey certain real estate. The vendee thereafter breached the contract and failed to make the payment of the purchase money. Thereupon the vendor brought suit for the purchase price and for specific performance of the contract. The decision was rendered by the United States

Circuit Court of Appeals of the Eighth Circuit. Judge Caldwell, voicing the opinion of the court, states:

"A vendor of real estate, who has executed a title bond conditioned for the conveyance of the land upon the payment of the price, has an election of remedies to recover the purchase money. He may sue therefor at law, or he may resort to equity for a specific performance of the contract by the vendee. *Whenever the purchaser has a right to go into equity and compel the execution and delivery of a deed, the principle of mutuality gives the vendor the right to go into equity to compel the vendee to perform the contract on his part by paying the purchase money. This is an exception to the general rule that equity will decline jurisdiction of a suit for a money consideration which could be recovered by an action at law. The exception is based on the established doctrine of equity that the right to a specific performance must be mutual, and that it must be enjoyed alike by both parties to every contract to which the jurisdiction extends. In every case, therefore, where the vendee would have the right by a suit in equity to compel the execution and delivery of the deed by the vendor, the latter may, by a similar suit, enforce the obligation of the vendee to pay the purchase money.*"

So we say, according to the well established principle of equity, if the vendee appellant had the right of specific performance, equity likewise gave such right to appellee, for "the right of specific performance must be mutual, and it *must be enjoyed alike by both parties to every contract.*"

THE WAIVER CLAUSE.

5. Said waiver clause in section 8 of the option, we submit, cannot be considered as a part of said contract (exhibit "A"). The mutuality of the contract (exhibit "A") is not affected by said provision of section 8, relating to the waiver of appellant's right of specific performance of the option. Neither does section 8 of the contract withhold the right of specific performance of the agreement (exhibit "A") from complainant. If so, there is no mutuality in the contract and it is a nullity.

Exhibit "A" is the contract sought to be enforced in this suit. Was ever a contract to purchase land simpler, plainer or clearer in its meaning? How can it be argued that said contract is *harsh, uncertain, ambiguous, vague, unreasonable or unconscionable?* The contract itself states that after Clark, Sizer and Whitmore had been working, examining and experting the mine for 18 months with a view of ascertaining its value, the second party (CLARK AND HIS ASSOCIATES) *"Have offered to the first party to buy the said property at the price of ($400,000) four hundred thousand dollars cash (American gold);* AND *the first party (complainant) has refused to accept said offer."* It is a simple unconditional offer to pay a certain amount of money, at a certain time, for the mine, which had been, prior to the execution thereof, thoroughly examined by appellant, and its value at said time could be easily ascertained from the ore then in sight.

No Remedy Expressly Given to Appellant.

6. There is no remedy *expressly* given to Clark and his associates in regard to enforcing this contract of purchase for $400,000 after it became mutually binding on April the 28th, 1903, by the written acceptance of said offer by complainant.

Did Clark and his associates have any remedy, *if complainant* had seen fit to breach this contract after the same became binding as aforesaid? Certainly he could have sued for specific performance of this contract (exhibit "A"), or for damages for its breach, *though no express provision is made in the contract for either remedy.* Equity would give him the right of specific performance, as it does in all such contracts, and the mutuality of the contract likewise gave the same right to appellee.

7. There is *no provision,* in case of a breach of *this contract* by the complainant, for the payment of liquidated damages by the complainant to Clark and his associates, and said *waiver clause* therefore does not refer thereto. Then where is any ambiguity in said contract of sale (exhibit "A") for $400,000? Where is any provision for *"withholding the remedy of specific performance of said contract from complainant?"* There is none whatever.

The stipulation for the payment of liquidated damages in the sum of $100,000 by the complainant *is only included in,* and is a part of, the option contract (exhibit "B"), in favor of Clark and his associates to *purchase the property at $600,000.*

The option contract never became vitalized or binding on Mr. Clark. Then how can he invoke the same

to prevent the enforcement of this contract sued upon by appellee?

We respectfully submit, then, that the rule *expressio unius est exclusio alterius* does not apply to section 8 of the contract, and that said rule is not applicable to the contract (exhibit "A") sued on for the recovery of the $400,000 purchase money and the specific performance of the same by complainant.

8. We have no criticism to pass upon the authorities cited by the appellant, to-wit:

O'Neill v. Van Tassel, 137 N. Y. 297;
Hammerquist v. Swensen, 44 Ill. App. 927.

They have no application whatever to the contract in suit.

Is there any limitation whatever in said contract, upon the complainant, as to which remedy it should pursue in the event of the breach of the contract by Clark and his associates? None whatever. Then we submit that complainant had the option to sue for the specific performance of said contract (exhibit "A") or for damages for breach of the same.

D.

We submit the following proposition is well settled by the great weight of authorities, to-wit:

If it appears from the terms of the contract that it was the intention of the parties to execute the same, then the fact that the contract stipulates that a certain sum shall be paid by either or by both of the parties as liquidated damages in case the contract is breached, and even if the contract further stipulates that only one of the parties shall have the right to enforce specific performance, such does not prevent the other party from specifically enforcing the contract also, because there would be no mutuality in the contract, unless both had the right to specifically enforce the same.

Authorities supporting said proposition:

Cathcart *et al.* v. Robinson, 5 Pet. 264, 8 L. 120;
O'Connor v. Tyrell, N. J. Eq., 30 Atl. Rep. 1061;
Rourke v. McLaughlin, 38 Cal. 196;
Hull v. Sturdivant, 46 Me. 34;
Dooley v. Watson, 1 Gray (Mass.) 414;
Hocker v. Pynchan, 8 Gray (Mass.) 550;
Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 423;
Ropes v. Upton, 125 Mass. 258;
Ewing *et al.* v. Gordon, 49 N. H. 455;
Ayrers v. Robbins, 30 Grat. 115;
Stewarts v. Bedell, 79 Pa. St. 336;
Gray v. Crosby, 18 Johns (N. Y.) 219;
Thornburg v. Fish, 11 Mont. 53, 27 Pac. 381;
Ensign v. Kellogg, 4 Pick (Mass.) 1;
Lyman v. Gedney, 114 Ill. 338, 29 N. E. 282;
Hodges v. Howing, 58 Conn. 12, 18 Atl. 979;

Gartrell v. Stafford, 12 Neb. 545, 11 N. W. 732;
Hemming v. Zimmerschitte, 4 Tex. 159;
Watterman on Spec. Perf., Sec. 22;
Fry on Spec. Perf., Sec. 121;
1 Suth. on Dam., pp. 90, 471.

We beg leave to refer to a few of said authorities:

(1) Rourke v. McLaughlin, 38 Cal. 196:

This is an action upon a contract to sell and convey real estate, and the contract provides in substance, that McLaughlin should sell the property for $1000, and Rourke agreed to pay said price. The 1st installment of $400 in 12 months, 2nd installment in 2 years, and the balance of the purchase price in 3 years. The contract further provided, that if the defendant at any time "should fail to make his payments, he was to surrender possession; that defendant was to have immediate possession under the contract." This action was brought for the first installment.

In his answer the defendant admits the making of the contract and his failure to pay the first installment, and alleges:

"1st. That under the contract it is his privilege to pay or surrender the possession of the estate; that he has elected to do the latter, and has offered to surrender, and still offers, and will continue to offer, until the termination of this suit.

"2nd. That, at the time said contract was made, the plantiff resided in this state, but since that time he has removed to Ireland, and is no longer a resident or citizen of the U. S.; and hence, if this defendant is made to pay

the purchase money, he will, for the reasons stated, be unable to enforce the contract as against the plaintiff, or compel him to convey."

Judgment was rendered for the plaintiff in the case in the lower court and the case was appealed to the Supreme Court. In passing upon this case and defenses set up by the defendant, the Supreme Court states:

"As to the construction put upon the contract by the defendant—that he has the election to comply with it by paying the money stipulated to be paid, or to annul it by surrendering the land— it is sufficient to say that it is wholly unwarranted. *Such a construction would destroy the contract, by destroying its mutuality, for it would be leaving the existence of the contract to the will of one of the parties, which would be to say that there was no contract at all. Obviously the election as to the remedy, if any, lies with the plaintiff, and not the defendant.*"

The contract in said case and defenses are very similar to the case at bar. The Supreme Court of California clearly and correctly states the law—that the defendant has no election but to pay the purchase money stipulated; and could not annul the contract by surrendering the land. This is what Mr. Clark has attempted to do in the case at bar. *He contends, that because the complainant in this case has failed to sue him for the $100,000 stipulated damages, for the breach of the contract, it has no equitable cause of action whatever against the defendant.*

The agreement of the parties was that the complainant company should sell the property for $400,000 and that Mr. Clark and his associates should pay said sum

for the property. The *intention of the parties was that the contract should be executed;* hence it does not lie in the power of either the complainant or defendant to destroy the mutuality of the contract. Such a construction would be equivalent to saying there was no contract at all between the parties, and the agreement sued upon would in such event be simply a rope of sand, without any force or binding effect. We submit the doctrine of *expressio unius est exclusio alterius* cannot be invoked by appellant without destroying the mutuality of the contract altogether. This would be an unreasonable construction to place on the contract.

(2) Crane v. Peer, 4th Atl. (N. J.) 72:

This case is a leading case on the question under discussion, and perhaps reviews more extensively the English authorities than any other decision we have read.

In this case the Supreme Court of New Jersey states:

"Where a party to an agreement insists on a payment of stipulated damages as a discharge, it must appear that the damages stipulated are in lieu of a performance of a contract, the payment of which damages is an alternative for his election.

"The contract must affirmatively show that the party bound can pay the damages at his own election and thus discharge the contract."

This decision holds that even if the defendant in the case at bar should come up and offer to pay the stipulated damages of $100,000 for the breach of the contract by him which defendant agreed to pay, still the complainant would have the right to enforce the specific performance of the contract, because the *intention* of the

parties evidently was to *perform* the contract, after the offer was accepted, and the contract of sale and purchase *became binding on both parties.*

(3) Ewing *et al.* v. Gordon, 49 N. H. 455:

Russ and Gordon entered into a written executory contract, the one to sell and the other to purchase land upon certain conditions. The contract only stipulated for the payment of the sum of $1200.00 by Russ to Gordon if the former failed to convey the land as stipulated in the contract. *Russ claimed that an action at law for damages was the only remedy Gordon had, and that the contract only provided for the payment of damages by one of the parties, to-wit, the vendor.* The Supreme Court of New Hampshire said:

"The imperfect compensation offered by damages recoverable by law for breach of covenant occasions a frequent application to equity to enforce a specific performance of the agreement. The jurisdiction is specially conferred by General Statutes, chapter 190, section 1, and rests upon the simple principle that the covenantee or the obligee has a moral right to the observance of the contract, to which rights the courts of law, whose jurisdiction does not extend beyond damages, have not the means of giving effect. * * *

"The defendant contends that the bond is not within itself an agreement, nor contains evidence of an agreement absolutely to convey land, *because it is at the defendant's option to forfeit the condition and pay the penal sum fixed by the bond,* or to convey the land on performance of the conditions precedent on the part of Russ to be performed; that there is not therefore in the

bond or condition or in both together contained, any contract or agreement of the defendant to convey the land to Russ. * * *

"We are, therefore, of the opinion that the bond and its condition being in equity a valid agreement and being founded upon a valuable and sufficient consideration, is also, independent of the parole testimony of the case (which, however, leads to the same result), evidence of *the mutual and reciprocal agreement*—an agreement by one party to purchase and by the other to sell. *The tie is reciprocal;* the obligation of the plaintiff to pay the balance of the agreed price being capable in law of enforcement, as well as that of the defendant, in equity, to convey—*the difference of security by bond for the ultimate performance by one party only (not more advantageous certainly to the plaintiff than that afforded the defendant* by the payment of one-half the price of the land), not affecting the legal or equitable right of the parties. *We understand that the obligation is mutual where both parties are required by the agreement to do something; the agreement of the one being a consideration for that of the other; that it makes no difference in this respect whether the obligation of the one is secured by the bond and that of the other not thus secured; nor that when the cause comes up for hearing, the plaintiff's part of the agreement has not actually been performed if its fulfillment is tendered,* and can be secured by the same decree which compels specific performance by the defendant; and especially if the defendant has sustained no damage, or none which cannot be compensated by the decree.

"In such a case the agreement sought to be enforced will be regarded as mutual and the tie reciprocal."

In this case the contract only provided that the vendor should pay liquidated damages in case of a breach of the contract, and the same was secured by a bond. Hence, *the vendor insisted, as the vendee does in the present case, that "expressio unius est exclusio alterius,"* should prevail. In other words, the vendors could only sue the vendee for the liquidated damages specified in the contract and could not enforce the specific performance of the contract. The Supreme Court of New Hampshire, however, states that the contract was mutual and reciprocal and that the difference of security by bond for the ultimate performance by one part only, does not affect the equitable rights of the parties and that it makes no difference in this respect whether the obligation of the one secured by the bond and that of the other not secured. In such a case the agreement sought to be enforced will be regarded as mutual and the tie reciprocal, because *"both parties are required by the agreement to do something."*

(4) Ropes v. Upton, 125 Mass. 258:

R. and U., partners in business in the town of D, dissolve their partnership by consent. A written agreement was entered into by them whereby R. agreed to assume the debts of the firm and U. agrees to sell to R. all his interest in the assets and good will of the firm for a certain sum, and not to manufacture or sell stoves or tinware or become engaged in said business either for himself or others thereafter in said town, "under forfeiture of one thousand dollars to be paid to said R. by

U. in case of breach of these conditions." U. breached the contract by undertaking to engage in the business at the place specified in the contract in opposition to R. R. brought suit to enjoin U. from engaging in the same business in opposition to him. U. contended that he had the right to pay the one thousand dollars liquidated damages and engage in the business at the time and place. The case was tried in the lower court and appealed to the Supreme Court and the court stated:

"It is often stated that a court of equity would not interfere to prevent a party from doing an act which he had agreed not to do, when liquidated damages are provided in case he does the act. But this must be taken with some qualifications; *for it must appear, from the whole contract, that the stipulated sum was to be paid in lieu of the strict performance of the agreement, and was an alternative which the party making the covenant had the right of option to adopt;* as in the cases often cited in support of the general proposition, Woodward v. Giles, 2nd Vern., 119; Rolfe v. Peterson, 2 Bro. P. C., 436; Ponsonby v. Adams, 2nd Bro. P. C., 431. *In Woodward v. Giles the defendant agreed not to plough any part of the land demised; and if he did, to pay twenty shillings per acre; and it was held that he had the privilege to plough by paying the additional rent,* and the court did not restrain him from doing that which the contract provided he might do. *So in Rolfe v. Peterson and Ponsonby v. Adams, the substance of the contract was held to be that, in one contingency the defendant was to pay a certain rent, and in another that he should pay a larger rent, and the court would not inter-*

fere. It is said in all cases on this subject, that the question in every case is, what is the real meaning of the contract? And if the substance of the agreement is, *that the party should not do a particular act, and that is the evident object and purpose of the agreement, and it is provided that, if there is a breach of this agreement, the party shall pay a stated sum, which does not clearly appear to be an alternative which he has the right to adopt instead of performing his contract,* there would seem to be no reason why a court of equity should not restrain him from doing that act and thus carry out the intention of the parties. *If such appears to be the purpose of the agreement, the fact that the sum to be paid is a stated or stipulated amount, in the nature of liquidated damages, should not oust a court of equity of its jurisdiction to compel the party to carry out his agreement."*

Now, the last case cited states, that it must appear from the whole contract, that the stipulated sum was to be paid in lieu of the strict performance of the agreement, and was *an alternative* which the party making the contract had the right of option to adopt, in order to prevent the party who did not breach the contract from enforcing specific performance of the contract.

The case of Ropes v. Upton further decides, *that if the contract was made to be performed by the parties and it was the intention of the parties that the contract should be performed, "The fact that the sum to be paid is a stated or stipulated amount, in the nature of liquidated damages, should not oust a court of equity of its jurisdiction to compel the party to carry out his agreement."*

Then can it be said, that complainant cannot enforce the agreement to pay the $400,000, because the contract provides that the complainant shall be liable to Clark and his associates for liquidated damages in the sum of $100,000, in the event of a breach of his *option contract,* should Clark exercise said option, and elect to take the property and pay therefor $600,000.00? Clark never elected or decided to take the property at said price. Hence *said option* never became binding on him. Said option is distinct and independent of the contract in suit to sell and purchase at $400,000.00. And the provision, *"shall not deprive Clark and his associates of the right of specific performance of the contract"* ceased to exist altogether when *the offer* of Clark and his associates was accepted, as thereby said option itself fell and became extinguished.

We respectfully submit, there is not a word in the contract to show that it was the intention of the parties to oust this court of equity of its jurisdiction to compel the defendant to carry out the contract in suit in the event he failed to pay the purchase money. The main idea that runs through all of said 50 cases cited above is, *Was it the intention of the parties to perform the contract?* If so, *the court will specifically enforce the contract in favor of either party* in case of their failure to comply with the same, unless the contract further provides that the party who has breached the contract shall have the alternative to pay a certain amount as damages in lieu of the performance of the contract and the contract must give to such party the option to do one or the

other of the alternatives, and in this way perform and satisfy the contract.

Mr. Sutherland in his splendid work on damages, 1st Sutherland on Damages, page 471, lays down the law clearly on this point, as follows:

"ALTERNATIVE CONTRACTS—These are such as by their terms may be performed by doing either of several acts at the election of the party from whom performance is due. *Performance in one of the modes is a performance of the entire contract and no question of damages arises. Such a contract, therefore, is not one for liquidated damages. * * * Stipulating the damages and promising to pay them in case of a default in the performance of an otherwise absolute undertaking, does not constitute an alternative contract. The promisor is bound to perform his contract. He is entitled to no election to pay the liquidated damages and thus discharge himself."*

(5) Ensign v. Kellogg, 4th Pick. (Mass.) 1:

In construing a written contract to convey land where there was a provision made therein for the payment of liquidated damages in the event the contract was not complied with, the Supreme Court of Massachusetts said:

"We are satisfied that no subject is more proper for the power of a court of chancery in decreeing specific execution than a contract for the sale of real estate; *for what is agreed to be done ought in conscience to be done. Nor is the remedy at law for damages complete or adequate,* for the thing contracted for is wanted, and the value in money may often be an unsatisfactory compensation."

(6) Diamond Match Company v. Roeber, 106 N. Y. 473, s. c. 13 N. E. 423:

The facts of this important case are as follows:

"A contract made by a seller with the purchaser, that he will not, at any time within 99 years, directly or indirectly engage in the manufacture or sale of friction matches, except in the capacity as agent or employee of said purchaser, within any of the several states of the United States of America, or the territories thereof, or within the District of Columbia, excepting and reserving, however, the right to manufacture and sell friction matches in the state of Nevada and in the territory of Montana. The contract further provides for the payment of liquidated damages in the sum of $15,000 to the purchaser for the breach of this covenant." The contract was breached by the seller.

The Court of Appeals of New York in rendering an opinion upon this very important contract said:

"In respect to the second general question raised, we are of the opinion that the equitable jurisdiction of the court to enforce the covenant by injunction was not excluded by the facts that the defendant, in connection with the covenant, executed a bond for its performance, with a stipulation for liquidated damages. It is of course competent for parties to a covenant to agree that a fixed sum shall be paid in case of a breach by the party in default, and that this should be the exclusive remedy. The intention in that case would be manifest that the payment of the penalty should be the price of non-performance, and to be accepted by the covenantee in lieu of performance. (Insurance Co. v. Insurance Co., 87 N. Y.

405.) But the taking of a bond in connection with a covenant does not exclude the jurisdiction of equity in a case otherwise cognizable therein, and the fact that the damages in the bond are liquidated does not change the rule. *It is a question of intention, to be deduced from the whole instrument and the circumstances; and if it appear that the performance of the covenant was intended, and not merely the payment of damages in case of breach, the covenant will be enforced.* It was said in *Long v. Bowring,* 33 Beav., 585, which was an action in equity for the specific performance of a covenant, with a claim for liquidated damages: "All that is settled by this claim is that if they bring an action for damages the amount to be recovered is 1000 pounds, neither more nor less." *There can be no doubt upon the circumstances in this case that the parties intended that the covenant should be performed,* and not that the defendant might at his option purchase his right to manufacture and sell matches on payment of $15,000.00 the liquidated damages. The right to relief by injunction in similar contracts is established by numerous cases."

(7) Hull v. Sturdivant, 46 Me. 34:

The plaintiff and defendant entered into an executory contract in writing to convey and purchase land upon certain terms specified in a contract. The contract also contained this provision: "To the true and faithful performance of the covenants and agreements as aforesaid, the parties aforesaid do hereby bind themselves and their respective heirs, executors, administrators and assigns in the penal sum of two hundred dollars as liquidated damages." The contract was breached by the vendor

and the purchaser brought suit for the specific performance of the contract. The Supreme Court of Maine said: "Where a contract, respecting real property, is in its nature and circumstances not objectionable, *it is as much a matter of course for the court of equity to decree a specific performance as it is for the court of law to give damages;* and, generally, a court of equity will decree a specific performance, when the contract is in writing, is certain, is fair in all of its particulars and it is for an adequate consideration and is capable of being performed; *the form of the instrument, by which the contract appears, is wholly unimportant.* Thus, if the contract appears only in the condition of the bond secured by a penalty, *the court will act upon it as an agreement, and will not suffer the party to escape from the specific performance by offering to pay the penalty.*" The court held that the contract should be specially performed, and it was so ordered.

REMARKS.

Then, after considering the numerous authorities cited and quoted, can it be said that the contract in question is a mere rope of sand to be broken at will by defendant, that it cannot be enforced by complainant, that it means nothing because it provides in paragraph 8 of the contract that the provision in regard to stipulated damages in favor of the defendant for the breach of *the option* for $600,000, if the defendant should make his election and decide to pay said sum for the property, should not deprive "Clark and his associates of the right to have specific performance of *this option contract,*" and not the other agreement, exhibit "A," in which defendant ob-

ligated himself to pay $400,000 for the property? There are only two cardinal points to be considered in the interpretation of this contract: First, Was it *the intention of the parties that the contract should be performed;* and second, *Was it an alternative contract?* That is, did it give the defendant the option of paying damages in lieu of performing the contract to purchase at $400,000 in case he breached it, instead of paying the purchase money?

The intention of the parties on the face of the contract is clear—that is, each agreed to perform the contract. The complainant to sell at $400,000 and the defendant to purchase at said price. This is beyond dispute. It is also quite clear that the *defendant has no right whatever to breach his contract and then, at his option, pay damages in lieu of the performance of the contract.* He has shown no disposition to do so and has not offered to do so. The contract gave the defendant no alternative whatever after he breached the contract, but it did give the complainant the option of either suing for the liquidated damages or bringing suit for the specific performance of the contract.

The contract on the part of the defendant and his associates was unconditionally to pay the complainant $400,000 at Fort Worth, Texas, within 90 days after the offer contained in the contract was accepted by complainant. This was all that the contract required of the defendant. This part of the contract was equivalent to a promissory note on the part of the defendants placed in escrow to pay $400,000 in the event their offer was accepted in the required time. The offer was accepted in

the required time and the promissory note became binding. This was all that Clark and his associates obligated themselves to do. This promissory note became effective and binding upon the acceptance of the offer by the complainant. The execution of the deed was and is incidental to the payment of the purchase money. Now, to say that the defendant Clark was wholly relieved from this promise or obligation to pay his promissory note, because there was a stipulation in the contract that Clark and his associates might enforce *the option contract* and compel the complainant to convey the land to them in case they elected under the *option contract* to take the property at $600,000, is the height of folly, unreasonable and not supported by any authority. The failure on the part of the defendant Clark to pay the promissory note or contract in question gave the complainant undoubtedly the right to sue the defendant for the enforcement of this contract or promissory note. Hence, the contract did expressly give the complainant the right to enforce the contract and recover the purchase money. Likewise, equity gave the defendant the right to sue for the enforcement of the contract of sale at $400,000 and to get his deed. The contract is mutual and, we submit, is fair and just and there is no reason shown from the evidence why the complainant should not recover this purchase money of defendant Clark. It has time and again offered to perform the contract and has tendered a deed to the defendant. On the other hand, the defendant has failed and refused to do anything towards the carrying out of the contract, or even to offer to pay the liquidated damages for the breach thereof. Now is a court of equity

going to place a premium on such conduct as this on the part of the defendant? If so justice and equity will be subverted and wrong and dereliction of duty will be rewarded.

In conclusion we respectfully submit, that the contract sued upon is as clear in its terms as the noon day sun, and the remedy of specific performance is not withheld from the complainant by section 8 of the contract, hence the lower court as well as this court committed error in refusing to enter a decree for the specific performance of the contract in favor of complainant. And, if complainant was entitled to such remedy, then this court committed error in summarily ordering the dismissal of complainant's suit. We submit it was proper for this court to enter such decree in behalf of complainant as was warranted by complainant's bill, the facts and the principles of equity governing the case.

II.

Defective Title.

A.

This court seems to find some objectionable features in the contract in regard to the title. The court makes use of the following language, to-wit:

"The contract recited that the appellee was the owner of the property it contracted to sell and which the appellant and his associates agreed to buy. It is true that the contract (which it was shown was drawn by the appellee's attorneys) also recited that the appellant and his associates had examined the appellee's title to the property and were satisfied therewith. In the same connec-

tion, however, it will be observed that although the contract recited that the appellee was the owner of the property, when it came to provide for the conveyance of it to the appellant and his associates, upon the performance of their agreements, the contract provided for the transfer of 'the titles which the first party (the appellee) through its directors or otherwise has in and to said property.'"

If the court means to imply by the above language that because at the date of the institution of this suit a part of the mining property was held in the name of three directors of the company, in trust for the company, and for this reason the contract could not specifically be enforced, the court is certainly in error.

It will be noticed that the supplemental bill and the evidence show the title to said property held in trust by said trustees, was duly conveyed by deed to the Rosario Mining and Milling Company by said directors, and that both in the amended bill and supplemental bill the complainant offers to convey all the property in accordance with the contract, to Clark and his associates. The evidence also shows that prior to this time a deed had been duly executed by complainant and its said directors, Walker, Tillar and Peacock, conveying both the legal and equitable title to all the property in question, to Clark and his associates and that such deed had been duly tendered to them.

We will refer to and discuss a few of the authorities bearing upon this issue.

1. Pomeroy on Specific Performance of Contracts, Sec. 342, states:

"It is also settled, that if the vendor has a good equit-

able title to the land—as, for example, he holds the land under a land contract—the mere fact that the legal title was outstanding at the time of making the agreement is no objection to his enforcing performance after he has obtained such legal title."

Smith's Prin. of Equity, p. 242;
Waterman on Spec. Per. of Con., Sec. 419;
McDonald v. Youngbluth, 46 F. R. 838;
Mowbray v. Brecknor *et al.*, 41 N. Y. Sup. 83;
Morrow *et al.* v. Lawrence *et al.*, 7 Wis. 588;
Berry v. Berry, 64 Miss. 709;
Townsend v. Goodfellow, 40 Minn. 312;
Atchison Railway v. Benton, 42 Kan. 698;
Tierman v. Roland 3rd Harris 429, 15 Penn. St. 429;
Lay v. Huber, 3rd Wats 367 (Pa.);
Slaughter v. Nash, 11 Ky. (1 Litt.) 322.

2. Smith's Principles of Equity, Sec. 242, correctly states the law as follows:

"To induce the court to decree a specific performance against a vendor, it is not, however, necessary that he should have the legal estate, for if he have only an equitable title, a performance in specie may be decreed, and he must obtain the concurrence of the persons seized of the legal estate. Although a purchaser is not bound to accept an equitable title, yet if the vendor obtains the concurrence of the person seized of the legal estate the circumstances that such vendor has only an equitable title, will not prevent a specific performance."

B.

This court further states in its opinion of this case:

"By his answer to the bill the appellant set up, among other things, that the appellee's title was defective, and, in support of that issue, introduced evidence tending to sustain it. That evidence the trial court failed to consider, deeming the appellant concluded by the provisions of the contract above referred to. *If there was a mistake in regard to the title, and if, in truth, the appellee's title to the property was not good,* we do not understand that, under the principles governing courts of equity, specific performance of such contract would be enforced."

This court seems to hold that if there was a mistake on the part of appellant in regard to the title, and if in truth, the appellee's title to the property was not free from all defects that under the principles governing courts of equity, specific performance of such contract would not be enforced, regardless of whether or not there was any *mutual mistake* and regardless of the express terms of the contract.

The contract sued upon states:

"Whereas, the said second parties, Clark, Sizer and Whitmore, have, after examination of said property and the titles thereto, notified the first party (appellee) that the second parties are satisfied with the titles to said property in the first party.

"The first party concurrently, or as near as may be with such payment (of the $400,000), to cause to be transferred to the second parties THE TITLES WHICH THE FIRST PARTY, THROUGH ITS DIRECTORS OR OTHER-

WISE, HAS IN AND TO SAID PROPERTY. SAID TITLES (TO ALL THE PROPERTY IN QUESTION) HAVING BEEN EXAMINED BY THE SECOND PARTIES, IT IS AGREED THAT THE SAME ARE GOOD AND SUFFICIENT."

The above language of the contract is clear and explicit.

Judge Dietrich in his opinion rendered in this case correctly stated:

"COMPLAINANT'S TITLE. *In view of the conclusion that the contract is a valid obligation, the contention that complainant's title is defective may be summarily disposed of. The defendants were to receive from complainant only 'the titles which the first party (complainant), through its directors or otherwise has' * * * 'Said titles having been examined by the second parties, it is agreed that the same are good and sufficient.' Such is the express language of the contract. And by it, the same as by any other provision, the parties are bound."* [Tr. p. 159.]

Now, by the terms of the contract, the complainant only obligated itself to convey to Clark and his associates the title to the property as was then held by the complainant and its directors, such being the express language of the contract. The lower court and this court, as we understand, holds that the contract is a valid obligation and binding on all the parties thereto. Then, in what manner is it possible for the appellant and his associates to be relieved from said binding stipulation in the contract? We respectfully submit there are only two ways in which appellant might be relieved from this express provision of the contract and that is,

either by *fraud* on the part of appellee or by the *mutual mistake* of both appellant and appellee.

FRAUD.

The appellant in its answer devotes about 40 pages to alleging acts of fraud perpetrated upon him by the directors and agents of the appellee, *which induced him to execute the contract.* The lower court has held there was no fraud perpetrated upon appellant and that he was not induced to execute the contract by any fraudulent act of the appellee. The court held that the contract was therefore a valid and binding obligation.

The appellant in its brief in this court, on page 44, states:

"No attack is made here upon the conclusion of the lower court based upon the conflict of evidence on that issue (fraud)."

And again, appellant in its said brief, on page 14, states: "The opinion upon which the decree is based contains a construction of the legal effect of the contract. The construction is fully in accord with the law and with the argument presented on behalf of the appellant to the lower court."

So it is not contended even by appellant, that said provision of the contract can be nullified or modified by reason of the alleged fraud perpetrated upon him.

It seems this court has nullified or at least modified said provision of the contract by reason of a *supposed mistake on the part of appellant alone.*

Mistake.

In the first place we respectfully submit *there is no allegation whatever, contained in the answer of the defendant in the lower court relative to any mistake.* It is an elementary principle of equity, that where there has been a *mutual mistake* of both parties in regard to a material provision of a contract, then by proper allegations in the answer and proof showing there was such *mutual mistake* on the part of *both of the parties* to the contract, such provision of the contract can be modified and reformed, but not otherwise.

Now we submit, there are *no allegations whatever in the answer alleging there was any mutual mistake* on the part of parties to said contract relative to the title of the property in question.

The Authorities on This Issue.

1. Fletcher in his valuable work on Equity Pleading and Practice, section 95, states:

"When a complaint in equity seeks relief from the effects or results of some accident or *mistake,* he should state in his bill, fully and explicitly, the circumstances, so as to present a clear picture of the particulars of how the complainant was misled, *of the character and causes of the accident or mistake, and how it occurred."*

2. Pomeroy on Equity Jurisprudence, Vol. 2, Sec. Ed., section 862, lays down clearly the rule showing what is necessary in order for either party to the contract to avail himself of any mistake in any provision of the contract, as follows:

"The American courts have pursued a more simple

and enlightened course of adjudication. The doctrine is well settled in the United States that where *the mistake* or fraud in a written contract is such as admits the equitable remedy of reformation, parol evidence may be resorted to by the plaintiff in suits brought for a specific performance. The plaintiff in such a suit may *allege,* and by parol evidence *prove*, the mistake or fraud, and the modification in the written agreement made necessary thereby, and may obtain a decree for the specific enforcement of the agreement thus varied and corrected. As in suits for a reformation alone, *the evidence must be of the clearest and most convincing nature; the burden of proof is on the plaintiff, and he must prove his case beyond a reasonable doubt."*

3. The law, in regard to the defendant availing himself of any mistake in a contract, is the same. The burden is upon him both to allege and prove that there was a *mutual mistake* before he can be relieved from the *express provisions* of his contract.

2 Pomeroy Equity Juris. (2nd Ed.), Sec. 860.

4. We called the attention of the court to another important case, almost identical with the case at bar and that is

Bradley v. Heyward, 164 Fed. Rep. 107.

The defendant in the case gave the plaintiff an option for five months, to purchase a certain number of acres of land in Massachusetts, at the price of $20,000. The land contained phosphate rock, but the extent of the mine for such rock was undeveloped. The plaintiff was given the right to exploit, examine and develop the

mine, *but all the expenses of development, the contract stated, should be paid by the plaintiff.* During the time of the option the plaintiff exploited and developed the mine at his own expense, and thereafter it was estimated to be worth $70,000. Plaintiff elected to take the mine before the expiration of the option, and offered the defendant the option price, but the defendant refused to perform the contract. Suit was instituted by the purchaser for the specific performance of the contract, and the defendant contended that there was *a mistake* in the amount of land described in the option, and also that *the contract was one sided, harsh and unconscionable, and the consideration was grossly inadequate.*

We quote from the opinion of the court as follows:

"I think that the law is correctely stated by Lord Romilly in Swaisland v. Dearsley."

"And after referring to the facts in that case, he says:

"But where there has been no misrepresentation, and where there is no ambiguity in the terms of the contract, *the defendant cannot be allowed to evade the performance of it by the simple statement that he has made a mistake. Were such to be the law, the performance of contracts could rarely be enforced upon an unwilling party who is also unscrupulous.* * * * I think that he is not entitled to say to any effectual purpose that he was under *a mistake when he did not think it worth while to read the particulars and look at the plans. If that were to be allowed, a person might always escape from completing the contract by swearing that he was mistaken as to what he bought, and great temptations*

to perjury would be offered. Here the description of the property is free from ambiguity."

5. Fry on Specific Performance, says (section 765):

"It seems on general principles clear that one party to a contract *can never defend himself against it by setting up a misunderstanding on his part as to the real meaning and effect of the contract or any of the terms in which it is expressed.*"

6. The Supreme Court of the United States in the case of

U. S. v. Atherton *et al.*, 102 U. S. 372,

states:

"It is too clear for argument that the particulars of the fraud, or *the manner in which the mistake occurred should be set out.*" (In the bill or answer.)

7. And again, the Supreme Court of the United States in the case of

Simmons Creek Coal Co. v. Doran, 142 U. S. 417,

states:

"The jurisdiction of equity to reform written instruments, where there is a *mutual mistake,* or mistake on one side and fraud or inequitable conduct on the other, is undoubted; *but to justify such reformation the evidence must be sufficiently cogent to thoroughly satisfy the mind of the court.*"

In this case there was an alleged mistake in a deed, and one of the parties was endeavoring to correct the mistake, and to modify the terms of the deed. The court held that *such mistake* must be *mutual* on the part

of the vendee and the vendor, and the mistake must have been clearly alleged by the party seeking the relief, and the proof "Must be sufficiently cogent to thoroughly satisfy the mind of the court," before the terms of the deed could be modified in any particular whatever.

We respectfully submit there is no allegation whatever in defendant's answer in this case of *any mutual mistake* on the part of complainant and Clark and his associates, and we further state without fear of contradiction, that there is no evidence whatever, either directly or indirectly showing a mutual mistake on the part of appellant and appellee in this case in regard to the execution of said contract or in regard to the terms thereof relating to title. Hence, we respectfully submit, this court is in error when it states there was a mistake on the part of appellant and appellee in regard to the title of the property in question, and therefore said provision of the contract in regard to the character of the title to be conveyed by the appellee to the appellant and his associates was not binding on the parties to said contract.

We respectfully submit that the lower court did not see fit to go into the question of title on account of said provision in said contract, because the court held that the contract was valid and binding, and the appellant and his associates had no right, on the pleading and evidence in this case, to modify or change any provision in said contract. But on the contrary, the court held: "THE DEFENDANTS WERE TO RECEIVE FROM COMPLAINANT ONLY THE TITLES WHICH THE FIRST PARTY (com-

plainant), THROUGH ITS DIRECTORS HAS. * * * SAID TITLES HAVING BEEN EXAMINED BY THE SECOND PARTIES, IT IS AGREED THAT THE SAME ARE GOOD AND SUFFICIENT. SUCH IS THE EXPRESS LANGUAGE OF THE CONTRACT. AND BY IT, THE SAME AS BY ANY OTHER PROVISION, THE PARTIES ARE BOUND." [Tr. p. 159.]

8. The Supreme Court of Oregon in the case of

Hawley v. Thompson, 14 Ore. 199,

states:

"And where *it appears from the contract ieself that the parties had in view merely such a conveyance as would pass all the title which the vendor had, whether defective or not, that is all the vendee can insist on.*"

Please read this well considered case by the Supreme Court of Oregon, which is so similar to the case at bar, in regard to the paragraph of the contract relating to the titles to be conveyed.

9. IN THE SPECIFIC PERFORMANCE OF CONTRACTS, A PURCHASER IS ONLY ENTITLED TO SUCH INTEREST IN THE PROPERTY AS HIS CONTRACT CALLS FOR.

Brashier v. Gratz *et al.*, 6 Wheat. 529;

Maxfield v. Bierbauer, 8 Minn. . . . ;

Pomeroy on Spec. Perf. Cont., Sec. 341.

10. Pomeroy on Specific Performance of Contracts, section 341, states:

"Where the vendee agrees to purchase a title which he knows to be defective, OR THE INTEREST, WHATEVER IT MAY BE, WHICH THE VENDOR HAS, this contract will be enforced at the vendor's suit."

11. Chief Justice Marshall also lays down the correct principle of equity in regard to the enforcement of the specific performance of a contract, similar to the contract sued on in the case of

Brashier v. Gratz *et al.*, 6 Wheat. 529.

The Supreme Court states:

"The contract stipulates that, after the payment of the purchase money, GRATZ SHALL CONVEY, not the land OR A GOOD AND SURE TITLE TO IT, BUT ALL HIS, THE SAID MICHAEL GRATZ'S ESTATE, RIGHT, TITLE AND INTEREST, OF AND IN ALL THE SAID RESIDUE OF THE ABOVE MENTIONED TRACT OF LAND. GRATZ WAS ABLE TO MAKE THE CONVEYANCE WHICH HE HAD CONTRACTED TO MAKE AND WHICH BRASHIER HAD CONTRACTED TO RECEIVE, AND HIS WANT OF LEGAL TITLE FURNISHED NO EXCUSE FOR THE NON-PAYMENT OF THE PURCHASE MONEY."

The evidence shows that appellee acted in good faith with Mr. Clark and that all the title papers to the property held by the appellee were delivered by the appellee to his associate and agent, F. L. Sizer. Clark says Sizer was in charge of the mines for him; that he had authority to investigate the titles to the property and to employ lawyers to pass on the same. The evidence shows that Sizer employed an eminent Mexican attorney, Manuel Prieto, to examine the title to the property, and who, in fact, did make a thorough examination of the same, and rendered to Clark and his associates two written opinions on the same. In the first opinion, exhibit "F" [Tr. p. 464], he reviews critically the title papers and points out some irregularities in the title, *among*

them the two defects now claimed to exist. There were some corrections made by the complainant in the titles, and thereafter, on the 11th day of May, 1901, said attorney rendered Mr. Clark and his associates another written opinion, exhibit "E" [Tr. p. 463], on the title to the property, in which *he calls attention to the execution of the three deeds hereinafter referred to by the three daughters of Mr. and Mrs. McKamy, and stated some irregularities and defects still existed in the titles. The attention of Mr. Clark and his associates was called to the so-called defects and hence there was not, and could not, have been any mistake whatever on the part of appellant in regard to the title to the property in question or said two alleged defects.* Hence, we most respectfully submit this Honorable Court was in error in holding *there was "a mistake in regard to the titles."*

After Mr. Clark and his associates as aforesaid had ample opportunity to make and did make a full investigation of the titles to the property in question, and after his attention was called to said so-called two defects, the contract sued upon was executed on May 1st, 1902.

By the terms of said contract we find the Rosario Mining and Milling Company only agreed and obligated itself *to transfer and "to cause to be transferred to the second parties the titles (to said property) which the first party,* through its directors or otherwise has in and to said property."

The titles to the property had been examined by Mr. Clark and his associates and they found the legal titles to some of the property were held by the directors (Walker, Tillar and Peacock) in trust for complainant

company, and the title to the remainder of the property was held by the company; but it is stated in the second paragraph of the contract that "the first party is the owner of the mine and mining property" (describing all of the property). Meaning that the company owned the equitable and superior title to the land. The purchasers, Clark, Sizer and Whitmore express themselves as being satisfied with the title to the property after it was examined, as aforesaid, though it appears from the opinions of their attorney, there were still some defects in the same.

Whatever title to the property held by the company or its directors is simply to be transferred to Mr. Clark and his associates. It matters not whether said title is good, bad or indifferent, the contract only provides that the same should be transferred to the purchasers, *not by a warranty deed,* but by a deed without a warranty, or rather by a quitclaim deed. *The company is not obligated to convey the land, but simply to transfer what title it may have to the land.*

Then we submit the contract is fully satisfied if the company transfers *the titles* to the property *which are held by it and its directors,* however defective they may be by a *quit claim deed* or a *deed without a warranty.*

We submit there is no merit in the claims of appellant in regard to either of the two defects mentioned in their brief.

First Alleged Defect of Title.

The bulk of the property in question was conveyed by a contract known as the Garcia contract August 4th, 1896, to Walker, Tillar and Peacock in trust for the

complainant company, instead of directly to the company. The said Walker, Tillar and Peacock being directors of the company at said time, defendant in his answer alleges, and counsel contends, *that inasmuch as said Walker, Tillar and Peacock did not have a written power of attorney to act for the complainant company at said time,* that the absence of the power of attorney rendered the conveyance invalid. This instrument was executed before a notary by Tiburcio Garcia, William N. McKamy and A. W. Long as grantors, conveying the property to Walker, Tillar and Peacock in trust for the Rosario Mining & Milling Company. This contract is introduced in evidence, see exhibit "D" attached to the deposition of Boix. [Tr. pp. 743-762.]

At this time, as the evidence shows and as it is admitted, the directors of said company were five, consisting of J. A. Walker, Ben. J. Tillar, John A. Peacock, A. L. Matlock and W. N. McConnell. They are recited to be such in complainant's charter [Tr. p. 196]. The company had been duly organized and said directors duly elected notwithstanding the statement to the contrary in appellant's brief. Now, a majority of the directors, Walker, Tillar and Peacock were present, representing the Rosario Mining & Milling Company, and signed said instrument in their capacity as directors of said company for said company in the protocolization of said instrument before the notary.

No power of attorney was necessary for a majority of the directors to represent the company.

The amended bill alleges the facts set forth in this Garcia conveyance, that the property was conveyed in

trust to Walker, Tillar and Peacock for the complainant company by said grantors, because at that time the company had not filed its charter qualifying it for doing business in Mexico. [Tr. p. 4.] The supplemental bill of complainant alleges, after the bringing of this suit, that said property was conveyed to said complainant company by said Walker, Tillar and Peacock. [Tr. p. 40.] We have introduced a deed in this case, Exhibit "F" duly executed by the said Walker, Tillar and Peacock and their respective wives conveying said property to the Rosario Mining & Milling Company [Tr. p. 263] (attached to Boix deposition). This deed as shown, has been properly protocolized and duly registered in Mexico where the said land is situated and no objection has been made to the same by the defendant.

Now even the good witness for defendant, Mr. Boix, a Mexican lawyer, in his deposition admits that article 1401 of the Civil Code of the state of Chihuahua, reads as follows:

"Article 1401 Civil Code.—Contracts made in the "name of another by a person who is not his legitimate "representative, shall be null, *unless the person in whose "name they were made shall ratify them before they "shall be retracted by the other party.*" [Tr. p. 672.]

This Civil Code, English edition, has been introduced in evidence in this case.

This witness also admits that article 189 and article 197 of the Commercial Code authorized "the directors "of corporations to carry into effect all of the operations "of the corporation and that the management of the af- "fairs of the corporation shall be done by its directors." [Tr. 682-3.]

Also, Boix admits that "if said conveyance, *the Gar-"cia contract, exhibit "E," did not convey the title to "said property to the Rosario Mining & Milling Com-"pany, the same was conveyed by said instrument to "Walker, Tillar and Peacock.*" [Tr. p. 690.]

The witness Boix further testifies in his deposition as follows:

"Q. Then Mr. Boix, in view of the prescriptions "(limitation) of the laws you have read, you may con-"clude that the contract entered into between Tiburcio "Garcia and the Rosario Mining & Milling Company "represented by Messrs. Peacock, Walker and Tillar, "was duly ratified by said company by the fact of the "payment by the said company of the price in which the "purchase was stipulated. Is that so?

"A. Yes sir." [Tr. pp. 692-3.]

Said witness also testifies *that even if said Garcia instrument was null, yet, if the Rosario Mining & Milling Company took possession of said property at the time of said conveyance and continually held the same in possession in good faith, believing that the property belonged to it and held continuous and peaceful possession of all of said property under said instrument for 10 years, then complainant's title to the property would be good by the statute of limitation under the Mexican laws.* [Tr. pp. 702-3.]

We submit, from defendant's own witness it is conclusively shown that complainant's title to the property, of which they complain on account of Walker, Tillar and Peacock not having a power of attorney from the com-

plainant company to purchase the property, is good, valid and marketable.

Felipe Seijas, another Mexican lawyer, testified by deposition, as follows:

That under articles 15, 18, 32, 265, 266 and 267 Commercial Code of the state of Chihuahua, which is translated in English and introduced in evidence, a foreign corporation can acquire title to land in Mexico without protocolizing and registering its charter. [Tr. pp. 905-6-7.]

Said witness further states and gives his reason and quotes the law showing that the Garcia conveyance is good and binding on the parties, because Walker, Tillar and Peacock constituted a majority of the directors of the complainant company and had a right to act for the company in the purchase of the land and to bind the company. [Tr. pp. 911-12.]

Said witness states that if for any reason *the title to the property was not conveyed by the Garcia instrument to the Rosario Mining and Milling Company, it was conveyed by said instrument to Walker, Tillar and Peacock.* [Tr. p. 912.]

The witness also testifies that under said Civil Code of the state of Chihuahua, articles 2352, 2354, 2220 and 2221 even if the directors had no authority for purchasing said property by the Garcia contract, yet by reason of the fact that the company took possession of the property and paid the balance of the purchase money $115,000, it thereby ratified the acts of its directors, Walker, Tillar and Peacock in the purchase of the property, and its title to the property was good. [Tr. p. 914.]

This witness testified under articles 1080 and 1081 of the said Civil Code of the state of Chihuahua the Rosario Mining and Milling Company *acquired title to the property in question by the 10 years statute of limitation, as it had held peaceful continuous possession of the property under color of title for 10 years.* [Tr. pp. 919-20.]

The witness, John A. Peacock, testified in his second deposition, that the Rosario Mining & Milling Company had held peaceful and continuous possession of said property from the date of said Garcia instrument up to the time he testified in December, 1907, in good faith, claiming said property under said conveyance. [Tr. p. 1215.]

The witness Seijas testified furthermore that the statute of limitation under the Mexican laws would run against the state or municipality, the same as an individual and quotes the section of said code, providing such. [Tr. pp. 921-2.]

Mr. Seijas also testified that the following is the manner in which land is conveyed in the republic of Mexico, to-wit:

"So far as contracts of purchase and sale, such as we "call deeds, are concerned between parties, who are then "in Mexico, the two parties appear before the notary; "they make their bargain right then before the notary "and he writes that in the books which he calls the pro-"tocol; that is signed by the notary and by the parties "and by their witnesses, and when it has been decided in "that way, that becomes the original contract. He then "makes a copy of it (called testimonio) for each party,

"and these copies he certifies to be correct; and they are "the ones that are afterwards carried to the registry "office and registered."

Said witness also states on the same page, that if a deed is duly executed according to the laws of any state of the United States where said instrument is made, conveying land in Mexico, the same will be valid, but that the instrument should be protocolized and registered in the following manner in Mexico: [Tr. pp. 937-8.]

"Now in regard to documents made in this country "and which are valid in this country affecting lands in "Mexico, the documents after their regularity having "been certified to by the officers in this country, and the "seals and signatures of those officers having been cer- "tified by the Mexican authorities, are then presented to "the judge of the first instance (in Mexico) if they are "in English and he makes an order that they shall be "translated into Spanish. When the translation is made "to his satisfaction, the Spanish translation is then sent "to the notary to be extended in full in his book of proto- "cols, and that has the same effect as an original docu- "ment made before him by the parties in Mexico." [Tr. p. 938.]

After this, the laws of Mexico and the testimony of the two Mexican lawyers considered, we respectfully submit that the court can come to no conclusion other than that there is no defect whatever in complainant's title, so far as want of power of attorney to Walker, Tillar and Peacock in representing the complainant company, in the Garcia conveyance.

The supplemental bill and the evidence further shows that Walker, Tillar and Peacock, joined by their respective wives executed a deed conveying said property to complainant on the .... day of ....., 1904, and this deed has been properly protocolized and registered and is in evidence. [Tr. p. 763.]

SECOND SO-CALLED DEFECT OF TITLE.

Complainant's amended bill states that complainant relies upon the stipulation in the contract which requires complainant *"to transfer only such titles to the "property as is held by it and its directors."* Complainant in no way admits any defects in its title. The defendant has devoted 40 pages of its second amended answer to alleging various and sundry defects in complainant's title to the property in question, *but said answer in no place either directly or indirectly alleges that the title to a large portion or any portion of said property is vested in the heirs of Letitia McKamy deceased, the wife of W. N. McKamy, and that therefore complainant has never acquired her title to, or interest in said property.*

26 Am. & Eng. Enc. of Law, p. 112;
Greenblatt v. Hermann, 144 N. Y. 13.

Three deeds have been introduced in evidence, executed by the three daughters (and their respective husbands) of W. N. McKamy and his said wife, Letitia McKamy, deceased. We submit that the defendant, Charles W. Clark, has failed to allege and prove that there are any other heirs of the said wife of W. N. McKamy, than the three daughters who executed said

deeds—the record does not show any; hence, the defendant has wholly failed to allege or prove there is any defective title to complainant's property by reason of any other heirs of said W. N. McKamy's said wife. If this is a defect it lies wholly outside of the record.

Defendant having failed to make any allegations in his amended answer in regard thereto, cannot now, we submit, claim that there is a defect in complainant's title by reason of the fact that title to a portion of the property may have been vested in the wife of one W. N. McKamy or her heirs.

The defendant claims that if Mrs. McKamy, wife of W. N. McKamy, was dead at the time of the Garcia conveyance then her community interest in the property, that W. N. McKamy undertook to convey in the Garcia contract was vested in her heirs and that there has been no conveyance of the property by said heirs to the Rosario Mining and Milling Company.

There are three deeds introduced in evidence, attached to the deposition of Boix, to-wit, exhibit "G" [Tr. pp. 785-795] executed by G. S. White and his wife H. B. White, exhibit "H" [Tr. pp. 795-807] executed by Letitia E. Swearington and her husband Henry S. Swearington and exhibit "I" [Tr. pp. 808-817] executed by A. W. Long and his wife Fanny Long, each of said three wives purporting to be the heirs of Letitia McKamy, deceased, wife of W. N. McKamy, joined by their husbands conveying said property in question to the Rosario Mining & Milling Company.

The testimony of John A. Peacock shows conclusively that H. B. White, Letitia A. Swearington and Fanny

Long were the daughters of W. N. McKamy and his wife Letitia McKamy and the heirs of the latter, and the only children left surviving her. [Tr. pp. 1217-1222.]

(1) BURDEN OF PROOF.—Where the defect in a title tendered in a suit for specific performance of a contract depends upon some intrinsic facts not appearing on the record to justify a refusal to accept the title, the defendant must allege and prove such defects.

The burden rests upon the defendant to allege and prove that there were other heirs of Letitia McKamy before they can show that there is any defect in the title in this particular. This they have not done. If the court should, perchance, find the evidence insufficient to prove said heirship, then we submit, *that the burden is likewise upon the defendant to allege and prove the specific defect in the title relied upon by him and he must both allege and prove that Letitia McKamy has children or other legal heirs than her surviving husband, W. N. McKamy, because he would, under the Mexican laws as well as under the laws of Texas and California, inherit her community interest in the property if there were no children.*

We call the attention of the court to a leading authority cited above, as the same is directly in point on this question.

Greenblatt v. Hermann, 144 N. Y. 13.

In this case the vendee, the plaintiff, sued for specific performance of the contract in which he agreed to buy and the defendant agreed to sell a certain lot, provided the title was perfect and he sued also in the alternative,

in a second count, to recover part of the purchase money paid and to recover damages because the title he alleged was defective. The defendant tendered to plaintiff a deed to the lot and plaintiff alleges he was ready and willing to pay the balance of the purchase money pursuant to the contract; *but objected to the title, because the record showed in the sale of the property in the* Nichols estate under the order of the Surrogate Court, certain persons, being "the heirs" of said Nichols were mentioned in the petition for said sale, whereas the law required "all the heirs" of the decedent should be designated in such petition and order of sale. The court held:

"But the vendee who refuses to take title upon the "ground of defect therein *must point out the objection "and give proof tending to establish it,* or to create such "a doubt in respect thereto as to render the title unmar- "ketable. The point, at least the title was doubtful, and "therefore unmarketable rests upon the *possible exist- "ence of heirs* on the mother's side, not brought into the "proceeding. If their existence had been shown, or evi- "dence given rendering it probable that such heirs were "in being the plaintiff would have been entitled to re- "lief (damages). It has often been said that the pur- "chaser is entitled to a marketable title. The title tend- "ered need not be bad in order to relieve him from his "purchase; but it must be defective in fact, or so clouded "by apparent defects, either in the record or by proof "outside of the record, that prudent men knowing the "facts, would hesitate to take it. *In the present case "there is no presumption in the absence of proof that "the mother of the decedent had brothers or sisters or*

"decendants of either. The title is not doubtful by rea-
"son of any fact shown or by reason of any inference
"from such fact. It is a probability merely that such
"heirs may exist, but the plaintiff (who sued in the al-
"ternative for damages by reason of alleged defects in
"the title) has not seen fit to give any proof on the sub-
"ject and has left it to conjecture merely, and a sus-
"picion or conjecture, without any fact to support it,
"does not raise a reasonable doubt as to the validity of a
"title good upon the record. We think it would be in
"accordance with equitable principles to permit the plain-
"tiff now to take the title tendered."

And the contract was specifically enforced by the court and the plaintiff was required to pay the purchase money and take the property instead of obtaining a judgment for damages for the breach of the contract on account of defective title as he prayed for.

There is no comment necessary on this authority. The court states in the case, which is like the one at bar, that where a contract for specific performance is being enforced, "a vendee who refuses to take title upon the "ground of defect therein, *must point out his objection "(in his pleading) and give proof tending to estab-"lish it."*

In the case at bar we submit, as held in the case cited, there is no presumption in the absence of proof that the deceased wife of W. N. McKamy had any other children than the three daughters or descendants of such. Title is not doubtful by reason of any fact shown or by reason of any inference from such fact. It is a probability merely; such may exist, but the defendant has not seen

fit to give any proof on the subject and has left it to conjecture, and a suspicion, or conjecture without fact to support it, does not raise a reasonable doubt as to the validity of complainant's title.

Counsel for appellant, on page 61 of their brief, refers to article 2061 of the Civil Code of Chihuahua, which is as follows:

"A division of the 'ganancials' by halves by the con-
"sorts or their heirs shall take place, whatever may be
"the amount of the property which each of them may
"have brought into or acquired during the marriage,
"and notwithstanding that either or both may have
"lacked property at the time of celebrating the mar-
"riage."

Counsel in discussing these laws of the state of Chihuahua insist on this article of the code as being applicable to the case at bar.

We respectfully submit that said article 2061 does not refer to the succession or inheritance of property upon the death of either of the spouses, but the same refers only to a division of the property upon separation of the husband and wife by agreement or where a divorce is granted. This may readily be seen by reading three or four articles of the code preceding said article 2061; hence we submit that said article 2061 and other articles relating to ganancials cannot be considered as applicable to the inheritance or succession of the community property of the deceased wife of W. N. McKamy.

We do not concede that the interest in the property in question standing in the name of McKamy was the community property under the Mexican law of W. N.

McKamy and his deceased wife. It may have been his separate property, and defendant should have introduced some proof on that subject; but granting, for sake of argument, that McKamy's interest in the property at the time of the Garcia conveyance was the community property of himself and his deceased wife, we respectfully submit that the doctrine laid down in Toland v. Earle, 129 Cal. 148, is not applicable to this case. That case is based upon the code of California, which is not applicable to this case, as the contract is to be performed in Texas. However, if the code of California should govern this case, which is not conceded, we submit that section 1401 of the Civil Code of California also is applicable, which states as follows:

"Upon the death of the wife, the entire community "property *without administration belongs to the sur-"viving husband,"* regardless of whether or not there are any children.

Now, there is no section of the Mexican code quoted which differs from the above section quoted from the Civil Code of California. There is no proof in this case that Letitia McKamy, the deceased wife of W. N. McKamy, had any other children than the three daughters, or descendants of children, and there cannot be any presumptions indulged in in this matter in the absence of direct and positive proof on the subject adduced by the defendant.

The contract was to be performed in Texas, and under the Texas law, as under the laws of California, where there are no children, the husband inherits all of

the community property and such property vests directly in the husband *without administration.*

See:

Gurley v. Ward, 37 Texas 20;
Greer v. Hugely, 23 Texas 539;
Wirtz on Succession, 111 La. 40.

The laws of Texas govern, for the contract is solveable, and in absence of direct proof of the laws of Mexico on this point, they are presumed to be the same as the laws of Texas.

Evans v. Anderson, 78 Ill. 558.

This case states:

"It is a principle adopted everywhere, that the nature, "validity and interpretation of contracts must be gov- "erned by the laws of the country where they are to be "performed."

THE LAW ON THE SUBJECT.

The principle of the "common law" that the title to decedent's personal estate passes to his personal representatives makes administration necessary, if there are creditors of the estate, so as to enable the creditors to bring suit and subject the property of the estate to the payment of the debts. The real estate passes directly to the heirs.

Am. & Eng. Enc. of Law, Vol. 11, 742.

Numerous cases are cited sustaining this proposition of law. We have examined them sufficiently to state that the weight of authority in the United States is to the effect that *if there are no debts, it is not necessary to*

have an administration. The probate laws are directory, so far as establishing and decreeing heirship is concerned, and while the authorities hold it is always better to have an administration, so as to have heirship adjudicated and placed of record, yet, if by neglect or otherwise there is no administration, to say that the heirs of the deceased cannot and do not inherit all the property, even in California, is simply absurd.

Appellant asserts in his brief that if any instrument affecting the title of real estate in Mexico is not recorded, such vitiates said instrument. His own witness, Boix, the Mexican lawyer, contradicts this assertion [Tr. pp. 695-7]; also it is contradicted by the witness Seijas [Tr. pp. 928-9].

We insist that the burden is still upon the defendant to point out the defect of title in his pleading. Having failed to do so, he cannot, and has made no attempt to, prove title is defective as claimed.

The defendant in this case, we submit, has failed in both instances. They have failed to allege the defect in regard to the McKamy heirs in his answer, and have wholly failed to prove any defect of title, in this particular.

We submit that the evidence shows that the complainant has had continuous, peaceful possession of the property under color of title for more than 11 years prior to the institution of this suit, and thereby the two alleged defects in complainant's title, if any ever existed, have been cured and the title perfected by the statute of limitation.

A title acquired by limitation is a good title and is a

sufficient title to enable the vendor to enforce the specific performance of a contract against the vendee even where there is no stipulation in regard to conveying a title inferior to a fee simple title.

26 Am. & Eng. Ency., p. 107;
Shriver v. Shriver, 86 N. Y. 576;
Donly v. Finn, 175 Mass. 70.

As to what is meant by onerous title generally, and in Mexico, see Noe v. Card, 14 Cal. 576.

We have discussed the alleged defect of title only because opposing counsel did so in their brief.

We still insist that appellant must stand by the terms of his contract, as to the character of the title to be conveyed, and that he has waived all defects of title, if any, to the property in question.

We come now to the third and last error which we feel sure the court has committed in its opinion rendered in this case.

III.

The court has erroneously held that the lower court as well as this court, sitting as courts of equity, have no jurisdiction to enforce the specific performance of the contract sued upon, because the same, "is one sided, harsh, unconscionable and destitute of all equity."

History of the Rosario Mines.

1. Perhaps it would be in order to give something of the history of the Rosario mines and value thereof as shown from the record in this case, in order to ascertain

whether or not said contract is one-sided, harsh and unconscionable. We quote from the defendant's answer in this case, paragraph 3, as follows:

"The property in suit is in the state of Chihuahua, in the republic of Mexico, about 120 miles from the nearest railroad station, in the heart of a very mountainous country, and between said railroad station and said property are high mountains impassible except by pack mules.

"The said mines have been worked at intervals for many years. * * * A vast amount of ore is on the dump."

Sizer and Whitmore, the mining experts and the associates of defendant Clark, made a preliminary examination of the mine just prior to the execution of the first option contract, dated May 12, 1900, and in this written report to Mr. Clark they state, among other things:

"It is without doubt one of the greatest mines in the world, and under American methods, with a large reduction plant, there is no question about what it would pay very handsome dividends upon the price at which it is offered to you. And, if all signs do not fail, the thorough reopening of the property will prove its market value to be greatly in excess of its present price." (The present price was then $1,000,000 T. & T.) [Tr. p. . .]

The words in quotation are taken from the brief of counsel for appellant in the lower court, and the note in parenthesis was made by counsel for appellant, Tobin and Tobin. The report is dated November 19, 1900.

Philip Argall of Denver, Colorado, one of the great-

est mining engineers and experts in this country, visited the mines and examined the same during the summer of 1902, and on the 15th day of October, 1902, he made a report on the mines, which may be found in the transcript, attached as an exhibit to the depositions of John A. Peacock [Tr. p. 1240], as follows:

"The Rosario mine is one of the famous mines of the southern republic. It is of recent discovery, having been found in October, 1835. The vein is a very large one and its outcroppings stand out boldly, forming a prominent feature in the landscape of the Guadalupe y Calvo district. The vein is not only very large, but at the surface the ore was immensely rich. In the comparatively few years it has been worked, in an active manner, it has produced millions of dollars. * * *

"RECAPITULATION.

	Tons.	Value.
"Ore in sight.....	170,000	$1,781,600.00
"Ore reserves.....	78,774	738,514.00
"Ore expectant.....	20,000	220,000.00
"Fillings	15,000	90,000.00
"Total.....	283,774	$2,830,114.00"

And Mr. Argall closes his report by stating:

"There could be extracted from the above ore a total net value of $1,524,890.24, by putting in proper machinery and reduction plant."

There is nothing in the record disputing any of the above and foregoing testimony in regard to the value of said mine. It will be remembered that Mr. Clark had been in possession of these mines, experting, developing

and examining the same, from the 12th day of December, 1900, to the day of the execution of the contract in suit, May the 1st, 1902.

RECITALS IN THE CONTRACT.

2. It is recited in the preamble of the contract that,

"Whereas, it is the *desire of each of the parties to further develop said property by the development work hereinafter stipulated, to the end of more certainly determining the value of said property,* and

"Whereas, in order to carry out this arrangement and purpose, and *to afford the second parties an opportunity to buy said property at the price of $600,000,* in the event of a failure of said first party to make a sale of said property during the life of this contract at more than $600,000, *and to afford the second parties the preference to buy said property at the price of $600,000, as herein stipulated.*"

These are the reasons and sole object and purpose for the execution of *the option* contract (exhibit "B").

The contract recites, and the evidence shows, that Clark offered on the first day of May, 1902, $400,000 in cash for the mine, but the appellee refused to accept that sum, but said offer was renewed by the terms of the contract in suit, and left open for the period of one year.

Now, the contract sued upon is given on page 9 of this brief, as exhibit "A." The option contract between the parties, which is not sued upon and has no bearing on the contract sued upon, is given in full in this brief, beginning at page 11.

The offer contained in this contract to purchase the

property for $400,000 was a unilateral contract, and was not binding upon the appellee until the offer was accepted. The principal agreement set forth in the dual contract of May 1st, 1902, was *the option* of Mr. Clark to purchase the property at $600,000, and most all of the stipulations in the dual contract relate to this option.

Now, this offer became effective and mutually binding on the appellant and his associates on the 28th of April, 1903, when the written notice of the acceptance of said offer was served upon Mr. Clark and his associates by the complainant.

Authorities on This Issue.

1. "An offer in a contract to purchase land becomes vitalized and binding upon both parties when the proper notice *of acceptance thereof is given in the time specified by the contract.*

Watts v. Keller, 56 Fed. Rep. 1;
Raymond v. Land & Water Co., 53 Fed. Rep. 883;
Willard v. Tayloe, 75 U. S. 501;
Brown v. Slee, 103 U. S. 828;
Guiser v. Warren, 175 Ill. 335, 51 N. E. 582.

ARGUMENT.

In view of the facts and the authorities, was there anything one-sided, harsh or unconscionable in said offer by Clark to purchase the mine on the day said offer was made, May 1st, 1902? Clark had examined the mine for 18 months. He had *voluntarily* fixed the price and made the offer before the execution of the contract, but the offer had been rejected by complainant. Was there

anything one-sided, harsh or unconscionable in said offer, when the same was afterwards accepted on the 28th day of April, by the appellant, and said offer became mutually binding? Was not this contract, on said date, as fair, just and equitable as on the day the said offer was made by Clark, May 1st, 1902? If it had, for any reason, undergone any change, please explain how. Did the development work to be done by Clark, as provided in the contract, have anything whatever to do with said offer? Did the development work decrease the value of the mine? No. Did the expenses incurred by the development work have anything whatever to do with this offer of $400,000 and the acceptance thereof? Did the amount of the profits to be made or expenses to be incurred in the development work have anything to do with said offer or the acceptance thereof? We must answer, No. Did the fact that the complainant reserved the right to take possession of said property after 90 days in the event it found a purchaser for more than $600,000, and Clark should decline to pay the amount so offered by such purchaser, in any way, directly or indirectly, affect said offer or make it harsh or unfair?

The court in its opinion states that the *option contract* "reserves the right on the part of appellee to sell the property to any other person, at any price it might fix in the event the development work performed by the appellant and his associates should prove the mine to be of *great value.*" And the court seems to think this provision in the contract made the same *one-sided, harsh and unconscionable.*

We submit the evidence shows the mine was of as

great value at the date of the execution of the contract as it was on the date of acceptance of said offer; and that the same was worth three or four times the purchase price sued for. Did any of the other provisions in the option contract affect this offer?

Now, we submit it is an elementary principle of equity that if there is any provision in the contract which would prevent the enforcement of the contract, and thereafter said provision was performed, the contract can thereafter be specifically enforced. For example, if one person contracts to do a certain amount of work to pay for the purchase of a piece of land, such contract is not mutually binding and is unenforcible. Yet, if the person who contracts to do the personal service, performs such service fully, according to the contract, then the contract becomes mutually binding and enforcible.

Brown v. Town of Sebastopol, 153 Cal. 707.

Likewise, if there is any harsh or unfair provision in a contract which would render the same unenforcible, and the person who is to comply with such provision, does in fact comply with the same, regardless of the unfairness or harshness thereof, then the contract is binding and enforcible by either party. Just so, if there is any unconscionable provision in a contract and the party who has obligated himself to perform such provision, does in fact perform the same, without objection, neither person can object to the enforcement of the contract if the other provisions are fair and equitable.

Now, we most respectfully submit that so far as the contract sued upon is concerned, none of the so-called harsh and unconscionable provisions mentioned by this

court *in the first place, has any relevancy to the contract sued upon* (exhibit "A"), which is based upon the offer of $400,000 and the acceptance thereof. *In the second place we submit that all of the so-called harsh and unconscionable provisions in the contract* were, in fact, performed by Mr. Clark, without any objection whatever, because he did not think the same were harsh, unfair or unconscionable when he made the contract, or when he was performing the development work.

The court also states:

"The contract binds Mr. Clark to operate the reduction works to their full capacity for one year, and to pay the appellee 20% of the gross output during the first 90 days, regardless of the expense of getting it out, and all of the profits thereafter."

Now, we submit that Mr. Clark complied literally with this provision of the contract, *without any objection,* and *without a murmur,* because he knew said provision was fair. Hence Mr. Clark cannot now charge that this so-called harsh and unconscionable provision is sufficient to prevent the enforcement of the contract sued upon. We respectfully submit that the evidence does not warrant the court in holding that this contract is unenforcible by reason of said provisions of the contract, which have been fully complied with, in every particular, by Mr. Clark.

Again, the court holds, another harsh provision of the contract was, that the contract bound Mr. Clark and his associates to buy the property for $400,000 at any time within the year, *even though the development work should prove the mine to be valueless.* We submit that

this conclusion of the court is based solely upon fiction, the product of the fertile imagination of counsel for appellant, as stated in their brief. All the evidence in the record relating to the value of the mine contradicts this supposition of the court's.

We respectfully submit that the ore in sight, as shown by the reports by Mr. Sizer and Mr. Argall, and the other testimony, was worth gross about two and one-half million dollars, on the day of the execution of the contract sued upon, and that the same was worth as much as, or more, on the day the offer of $400,000 was accepted. For the appellant's counsel to say, or for the court to hold, that there was a mere possibility for this great and valuable mine to become *worthless* by the development work, is simply preposterous and without any foundation whatever.

The court finds another *harsh* provision in the option contract in this, that the appellee reserved the right to sell the property to another purchaser, and Mr. Clark only had the preference option to purchase the property in the event the complainant failed to find a purchaser for the property for more than $650,000; and in the event he did find a purchaser for the property for more than $650,000, *then Mr. Clark would not have the right or option to purchase the property, but would have to be contented with the payment to him of the munificent bonus of $50,000 cash.* It does not seem to me that this was a very *harsh* or *unconscionable* provision in the contract. Neither Clark nor complainant had any idea of selling the property at a price in excess of $650,000. Clark well knew that complainant would never find a

purchaser for the mine at a price in excess of $650,000, and we submit that this was a safe and fair proposition for Mr. Clark. There was, perhaps, just one chance in a thousand that the complainant might sell the property in excess of $650,000, but in that event the contract made the *provision* that Mr. Clark should be paid the *magnificent bonus of $50,000,* without any further consideration. Mr. Clark was *fully satisfied* with this provision; it was doubtless put in the contract at the instance of Mr. Clark himself. There was no objection raised to this provision of the contract at any time by Mr. Clark. We submit in all fairness that said provision was just and equitable to Mr. Clark, *although said provision was a part of the option contract, and had nothing whatever to do with the offer and acceptance of $400,000* or the payment of the same.

We submit that the option contract did give Mr. Clark the exclusive right to purchase the mine within 12 months from the date of the contract, except only in the event complainant, perchance, found a purchaser for the mine in excess of $650,000. Now, Mr. Clark had fully made up his mind, and the contract so states, that regardless of how valuable the mine might become, by developing, he was unwilling to give more than $650,000 for it, and in the event complainant sold it for a greater amount than that, he would rather be paid a bonus of $50,000 in cash and let the other fellow take the mine. It seems to us that this was a most sensible provision in the contract, and showed what a shrewd and ingenious business man Mr. Clark was.

Now, the contract provided that the complainant might

take possession of the mine at the expiration of 90 days. This seems to be the *biggest bugaboo* in the mind of appellant's counsel as well as in the mind of this court, and hence, counsel for appellant descants at length in his brief upon the *doctrine of nullification.* The argument of counsel on this point reminds us forcibly of the debate between Daniel Webster and Mr. Hayne *on the doctrine of state rights and nullification.* Every line in appellant's brief seems to be emphasized and underscored on this point, and I am fully satisfied that the court has been misled by the seeming seriousness and emphasis placed upon this point by counsel for appellant.

Now, what was the sole object and purpose of the option contract? It was to enable Mr. Clark to develop, exploit and examine the mine to ascertain its value with a view of buying and giving more for the mine than his offer of $400,000. Said provision in regard to taking possession after 90 days refers evidently only to complainant's right to take possession in the event complainant found a purchaser at the price of $650,000 or less, and Mr. Clark *refused to exercise his exclusive preference right* to purchase the mine at such price; or in the event complainant should, perchance, sell the mine for more than $650,000 to some other person and paid Mr. Clark a bonus of $50,000. In either of such events complainant should have the right to take possession of the mine at any time after 90 days to consummate the sale to such person and to deliver possession of the same to such purchaser.

Now, we submit there is nothing very unfair, strange or extraordinary in this provision. Mr. Clark had re-

served the exclusive right under the option to purchase the property in the event complainant failed to get a *bona fide* offer for the property in excess of $650,000. So, even though the contract be construed that the complainant had the right to take possession of the mine after 90 days of development work, regardless of getting a purchaser for the property, *yet, notwithstanding Mr. Clark still had the exclusive right under the option to purchase the property at $600,000 at the end of 12 months from the date of the contract.* This provision of the contract, when construed in the light of all the circumstances and the development work heretofore made on the mine, was fair and just to all the parties.

Mr. Clark knew at the time of the execution of the contract that, considering the inaccessibility of the mine, and the great trouble of carrying machinery or anything else into or from the mine, except on mule back, and the distance from the railroad, that the complainant would not be able to sell the mine at a greater price than $600,000, regardless of what the mine might prove to be worth by the development work. Mr. Clark had fully made up his mind, regardless of the development work and the increased value of the mine from development, that he would not under any circumstances give more than $650,000 for the mine, hence there was an express provision in the contract that it mattered not what occurred, he would have the exclusive right to purchase the mine, except in the event the complainant found a *bona fide* purchaser and sold the mine for more than $650,000; and in that event the contract provided that

he, Clark, should be paid the sum of $50,000 bonus in cash, and he would thereby make money on the deal.

The court also criticised the provision in the contract that the mill should be run at full capacity during the 12 months in the development work. Examine the contract and the evidence and see what kind of a mill was on this plant. It was simply an old 10-stamp mill. The evidence shows it was not at all suitable for properly working the mine with a view to making money by extracting gold and silver out of the ore. Mr. Sizer, as well as Mr. Argall, states it was necessary to get new, modern machinery to properly work the mine and to make a success of it. [Tr. 428.]

Now, Mr. Clark, in making his development work there, had the right to use the ores taken from the mine, and to extract the metal therefrom, and to sell the same. During the first 90 days, when, perhaps, the richest parts of the mine were to be examined and exploited, Clark was to get 80% of the gross amount of precious metal obtained by running the mill and reducing the ores. During the remaining 9 months of the year Mr. Clark had the right to run the mill and cyanide plant and to make his expenses, incurred while developing, exploiting and examining the mine. It was thought by the parties, according to the stipulation of the contract, that more than probable he would be able to thus make expenses while he was making the examination and exploiting of the mine. The court criticised this provision as being *exceedingly harsh and unconscionable* for Mr. Clark.

We have read and examined more than a *hundred*

cases involving mining contracts of this description, and we must confess and state to this court that we never examined any contract, and have never heard of any contract, between the owner of a mine and the option holder, where there was a provision in the contract made whereby *the holder of the option could make his expenses, incurred while examining the mine.* Such contracts almost invariably provide that the examination shall be made at *the expense of the option holder.* It does seem to us that *this provision,* although *criticised so severely* by this Honorable Court, and by counsel for appellant, is *reasonable, fair, just and wise*, made to defray the expenses of such developing and examination of the mine. Therefore, I ask this court, in fairness, to reconsider all of said provisions of the contract in suit, read them in the light of all the facts, and we believe that when said contract is construed in the light of all the evidence, and in the light of reason, and the principles of equity, it will be found to be as fair an option contract as was ever executed.

Hardship.

The defendant Clark contends that the payment of the purchase money now sued for would work a hardship upon him. Whoever signs a contract to do some lawful act, in the absence of fraud or mistake, is required to perform his contract or pay the damages. Contracts relating to the sale of real estate are always enforced, if found to be mutually binding, regardless of whether they work a *hardship* on one party or the other.

Mr. Pomeroy, in the last edition of his eminent work

on Equity, to-wit: 6 Pomeroy Equity Jurisprudence, Sec. 789, lays down the principles of equity clearly and forcibly upon this point, as follows:

"Where no other element enters than a *hard bargain* or mere inadequacy in consideration, it is the rule in equity to enforce the contract. The mere fact that defendant entered into a losing bargain or one where plaintiff will reap great gains is clearly never a ground to refuse specific performance."

Other authorities supporting said proposition:

Franklin Co. v. Harrison, 145 U. S. 459;
Whittier v. Fuquay, 127 N. C. 68;
Young v. Wright, 65 Am. Dec. 303 (Wis.);
Lee v. Kirby, 104 Mass. 420;
Clark v. Hutzler, 96 Va. 73.

2. We again refer to the case of Bradley v. Heyward, 164 Fed. Rep. 107.

The facts in this case have been previously given in this brief. The defenses on the part of defendant were that the contract was *one-sided, unfair, harsh and unconscionable,* and therefore the court of equity had no jurisdiction to specifically perform the contract to purchase the phosphate mine in question. We again quote from the opinion in this analogous case at page 112, as follows:

"The parties to the contract have already been named; both parties being represented by competent lawyers. It is not therefore a case of the wolf and the lamb. The fairness of it must be judged of as of the time at which it was entered into. The defendant was the owner of a

large body of land upon which it was known that there was a phosphate deposit, but the extent of that deposit was not known. There is nothing in the testimony which shows that the defendant was at that time under any stress of necessity which would impel her to sacrifice her property, and there is no testimony tending to show misrepresentation or concealment on the part of the plaintiffs. The extent of the phosphate deposits could only be ascertained after thorough examination, which required time, skill *and the expenditure of a considerable amount of money.* The plaintiffs were willing to make this expenditure if, after their examination, they could purchase upon terms which would be profitable to them. *The defendant, after time for full deliberation, fixed those terms.* Up to this point it seems clear that the contract was made fairly, without fraud or overreaching or taking any undue advantage. *It was not made in haste, but after full opportunity for deliberation, by educated men, of more than ordinary intelligence, having the use of their eyes, their minds on the alert, and their interest awakened, and means of knowledge being open to both.* It was known to both parties that there was rock on the land. The plaintiffs were willing to expend the time and money necessary to develop the extent of the deposit, and the defendant was willing to allow them to do so, limiting the time for such examinations, and agreeing to sell all the rock upon the land for a fixed sum. *All the expenses of this exploitation was to be borne by the plaintiffs.* This expense, according to the testimony, was something over $2,500, and would have been a total loss to the plaintiffs if rock in paying quan-

tities had not been found. *There is nothing unreasonable or unconscionable in such a contract. In the very nature of things all mining operations are problematical and doubtful.* No science can afford a sure guaranty against losses, disappointments and reverses, and it comes to this: Shall the plaintiffs be deprived of the benefits of a contract, fair and unobjectionable at the time it was made, because it has turned out that, as the result of their enterprise and expenditure, a much larger quantity of rock has been discovered on the land than the defendant believed to be there at the time the contract was made?"

3. Fry on Specific Performance (section 389) says: "The fairness of a contract, like all its other qualities, must be judged of at the time it is entered into, or at least when the contract becomes absolute, and not by subsequent events, for the fact that events uncertain at the time of the contract and afterwards were in a manner contrary to the expectation of one or both of the parties is no reason for holding the contract to have been unfair. The period, says the Irish Lord Chancellor Manners, at which the court is to examine the agreement between the parties, is the time when they contracted."

Sizer, one of appellant's associates, testifies [Tr. p. 390] that after the contract was drawn up by appellee's attorneys at Fort Worth, Texas, it was then sent to him at Butte, Montana, and he delivered the same to appellant and the latter had the contract in his possession 10 days, and *that Mr. Clark submitted the same for examination to his attorney, Judge W. M. Bickford, one*

of the greatest mining lawyers in the world. Evidently Mr. Clark and Judge Bickford did not then think the *contract* was either *harsh* or *unconscionable.*

Judge Dietrich in his opinion states that Mr. Clark "had lived many years in a mining community and was not only acquainted with the practical operation of mines, but also had an intimate knowledge of commerce and mining property. Evidently the parties negotiated with each other on an equal basis."

We submit there is not one word, syllable or clause in the option contract that has in any way whatever altered or affected, either directly or indirectly, the terms of said contract to purchase the mine at $400,000. Furthermore, all of the provisions stated in the contract, described by the court and designated as *one-sided, harsh and unconscionable, have been fully performed by Mr. Clark, without any objection, and without a murmur.* Hence, such objections by Mr. Clark come now in poor grace, and we do not think they are tenable. It is not the so-called *harsh and unconscionable provisions* of the option contract that are now sought to be enforced, but it is the simple promise to pay $400,000, the purchase price of the mine, to complainant; the deed has already been duly executed and tendered. So it is only a question of collecting the purchase price.

The demurrer interposed by the defendant to the bill, which was argued at such great length before Judge Morrow, who was holding United States Circuit Court at the time, raised all the defenses now urged by appellant to the specific performance of the contract. Said demurrers were thoroughly argued and ably briefed by

counsel for appellant, and Judge Morrow held, after due consideration of the same, that the contract could be specifically enforced, and that its terms were fair, just and equitable, and complainant was thus convinced of the sufficiency of its bill and the correctness of said order rendered by Judge Morrow, and was thus lulled into security. Since then the provision for the payment of liquidated damages for the breach of the contract has been barred by the statute of limitation.

4. The Supreme Court of Wisconsin, in the case of Park v. Minneapolis etc. Co., N. W. 45, 532, states:

"The present case is before us in its inception. Testimony has not been taken. No bar of limitation has run against a proper action at law."

And the court held that this fact, whether or not such legal remedy has been barred by the statute of limitation, should be considered by a court of equity before it summarily dismisses a suit for specific performance.

5. Pomeroy on Spec. Perf. of Contracts, Sec. 478, states:

"In some of the states the courts have gone a step further and have allowed damages, even though the plaintiff knew or had reason to know at the time of bringing his suit that a specific performance was impossible; but only when such relief in the equity action is necessary to prevent a failure of justice."

6 Without discussing the case of Cathcart *et al.* v. Robinson, 5 Pet. 264, we must say that this case is in point and should be thoroughly considered in passing on the case at bar.

7. We call the attention of the court to another important and analogous case rendered by the Supreme Court of the United States, and that is

King *et al.* v. Hamilton *et al.,* 4 Pet. 311, in which the court states:

"It has become almost as much a matter of course for a court of equity to decree a specific execution of a contract for the purchase of lands, where in its nature and circumstances it is unobjectionable, as it is to give damages at law where an action will lie for a breach of the contract."

8. Another case almost identical with the case at bar is that of Willard v. Tayloe, 75 U. S., page 557. The facts in this case, quoting from the opinion of the court, are as follows:

"In April, 1854, the defendant leased to the complainant the property in question, which was generally known in Washington as the 'Mansion House,' for the period of ten years from the 1st of May following, at the yearly rental of $1,200. The lease contained a covenant that the lessee should have the right or option of purchasing the premises with all the buildings and improvements thereon at any time before the expiration of the lease, for the sum of $22,500, payable as follows: $2,000 in cash, and $2,000, together with the interest on all the deferred installments, each year thereafter, until the whole was paid; the deferred payments to be secured by a deed of trust on the property, and the vendor to execute to the purchaser a warranty deed of the premises, subject to a yearly ground rent of $390. * * *"

It will be seen said lease ran for ten years and there was an option given in the lease to purchase the property at any time before the expiration of the lease for $22,500. Just before the lease expired the lessee served notice on the owner of the premises that he would purchase the property, and made a tender of the first cash payment, in legal tender notes, which was worth about half as much as gold at that time. The defendant put in the usual defenses; that the contract was *one-sided, harsh and unconscionable;* that the amount designated as the *purchase price* in the lease was *wholly inadequate* consideration for the property at the time of the notice of acceptance of the offer was served; and the court finds that the value of the property was worth a great deal more than the amount stipulated as the purchase price in the contract. Also it was urged by the defendant that a half interest in the property had been sold to a third person by himself and that the amount of money tendered was not the value of gold, which was contemplated by the parties in the contract. The lower court found that the contract was *harsh* and *unconscionable* and refused to specifically enforce the contract and *summarily dismissed plaintiff's bill, holding that the same was destitute of equity.* The case was appealed to the Supreme Court of the United States.

We quote from the opinion of the Supreme Court as follows:

"The discretion which may be exercised in this class of cases is not an arbitrary or capricious one, depending upon the mere pleasure of the court, but one which is controlled by the established doctrines and settled prin-

ciples of equity. No positive rule can be laid down by which the action of the court can be determined in all cases. In general it may be said that the specific relief will be granted when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice."

"We proceed to consider whether any other circumstances have arisen since the covenant in the lease was made, which renders the enforcement of the contract of sale, subsequently completed between the parties, inequitable. Such circumstances are asserted to have arisen in two particulars; first, in the greatly increased value of the property; and second, in the transfer of a moiety of the complainant's original interest to his brother.

"It is true, the property has greatly increased in value since April, 1854. Some increase was anticipated by the parties, for the covenant exacts in the case of the lessee's election to purchase, the payment of one-half more than its then estimated value. *If the actual increase has exceeded the estimate then made, that circumstance furnishes no ground for interference with the arrangement of the parties. The question, in such case, always is, was the contract, at the time it was made, a reasonable and fair one?* If such were the fact, the parties are considered as having taken upon themselves the risk of subsequent fluctuations in the value of the property, and such fluctuations are not allowed to prevent its specific enforcement. Wells v. The Direct L. and P. Railway Co., 9 Hare, 129; Low v. Treadwell, 12 Me. 441; Fry, Spec. Perf. of Contracts, Secs. 235 and 252.

"Here the contract, as already stated, was, when made, a fair one, and in all its attendant circumstances free from objection. The rent reserved largely exceeded the rent then paid."

We think the decision in said case is applicable in every particular to the case at bar, and should be decisive of the issues in this case.

All the witnesses [Burney, Walker, Peacock and Sizer, Tr. pp. 396 and 415] present at San Francisco when Mr. Clark was served with notice, say that Mr. Clark acquiesced in the acceptance of the offer on April 28, 1903, and *acknowledged his liability then and there for $400,000.* What did he do on the 11th day of May following? Why, he entered into a written contract [exhibit attached to deposition of Clark, Tr. pp. 416 and 620] with Frank L. Sizer, in which he acknowledged that he had purchased the property from the Rosario Mining and Milling Company and stated in that contract that the property was *his property and authorized and empowered Frank L. Sizer to sell the same for $500,000.* Clark admits the execution of the contract, and there can be no question about it. Would a man misled or wronged as Clark now claims he was, have acted as Clark did? Clark held possession of the property from April 28, 1903, to October 2d, 1903 [Peacock's deposition, Tr. p. 621].

When this suit was filed and defendant put in his answer in the early part of 1904, there was nothing said about misrepresentation, or unfairness, or harshness of the contract in this answer. In fact, these defenses now urged were not thought of until the spring of 1907, just

prior to the filing of the first amended answer by Charles W. Clark. It was at this time that a bright idea suddenly dawned upon him and he set up said defenses.

Now, we submit, after considering all the facts and principles of equity applicable to the present case, that the complainant has the right to have the contract in suit specifically performed, because the same is fair, just and reasonable, and it was the intention of the parties that the same should be performed when the same was executed, and such being the case, we submit the court, after reversing the judgment of the lower court, erred in summarily ordering the dismissal of this suit.

We therefore most respectfully ask the court, in conclusion, to grant a rehearing of this case and to render or to direct such a decree in favor of appellee as would be meet and proper, and as may be warranted by the facts of this case and the principles of equity.

DREW PRUITT,
Solicitor for Appellee.

I hereby certify that in my judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

DREW PRUITT,
Solicitor for Appellee.